165-536

165-538

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 554.

LEANDER J. McCORMICK, PLAINTIFF IN ERROR,

vs.

THE MARKET NATIONAL BANK OF CHICAGO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JULY 13, 1896.

(16,333.)

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1 STATE OF ILLINOIS, SUPREME COURT, } ss:
Central Grand Division, }

At a supreme court begun and held at Springfield on the first Tuesday in the month of January, in the year of our Lord one thousand eight hundred and ninety-six, the same being the seventh day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: Alfred M. Craig, chief justice; David J. Baker, justice; Jesse J. Phillips, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; James H. Cartwright, justice.

Be it remembered that on, to wit, the fourth day of January, in the year of our Lord one thousand eight hundred and ninety-six, there was filed in said supreme court the transcript of a record of the superior court of Cook county, Illinois, and the transcript of a record of the appellate court of the first district of the State of Illinois; which said records are in words and figures following, to wit:

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable John Barton Payne, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house,
2 in the city of Chicago, in said county and State, on the first Monday, being the first day, of July, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

Present: The Honorable John Barton Payne, judge of the superior court of Cook county; Jacob J. Kern, State's attorney; James Pease, sheriff of Cook county.

Attest: STEPHEN D. GRIFFIN, *Clerk.*

Be it remembered that heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and ninety-five, there was filed in the office of the clerk of the superior court of Cook county a certain præcipe for summons, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County, June Term, A. D. 1895.

LEANDER J. MCCORMICK, Plaintiff,
vs.
MARKET NATIONAL BANK OF CHICAGO, Defendant.
} Assumpsit. Damages, $30,000.00.

The clerk of said court will issue summons in the above-entitled cause to said defendant in a plea of trespass on the case on promises, to the damage of said plaintiff in the sum of thirty thousand ($30,000) dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the July term of said court, A. D. 189–.

3 PENCE & CARPENTER,
Plaintiff's Attorneys.

To Stephen D. Griffin, Esq., clerk.
Chicago, 17th July, 1895.

And afterwards, to wit, on the 19th day of June, A. D. 1895, there was filed in the office of the clerk of said court a certain declaration, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County, July Term, A. D. 1895.

Leander J. McCormick, plaintiff in this suit, by Pence & Carpenter, his attorneys, complains of The Market National Bank of Chicago, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises—

For that whereas the said defendant, to wit, on the first (1st) day of June, in the year of our Lord one thousand eight hundred and ninety-five (1895), in said county, became and still is indebted to the said plaintiff in the sum of thirty thousand ($30,000) dollars of lawful money of the United States of America for money before that time lent and advanced by the said plaintiff to the said defendant and at the special instance and request of the said defendant, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like special instance and request of the said defendant, and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and

4 owing from said defendant to said plaintiff, and in the like sum for goods, wares, and merchandise before that time sold and delivered by the said plaintiff to the said defendant at the like special instance and request of the said defendant, and in the like

sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested;

And whereas also the said defendants afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of thirty thousand ($30,000) dollars of like lawful money as aforesaid, and, being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested:

Nevertheless the said defendant (although often requested, etc., to wit, on the day when the said sums of money became due and payable, and oftentimes since, to wit, at the place last aforesaid) has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto wholly neglected and refused and still does neglect and refuse, to the damage of the said plaintiff of thirty thousand ($30,000) dollars, and therefore the said plaintiff brings suit, etc.

PENCE & CARPENTER,
Plaintiff's Attorneys.

And afterwards, to wit, on the 25th day of June, A. D. 1895, there was filed in the office of the clerk of said court a certain plea, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County, }

Superior Court Thereof, June Term, A. D. 1895.

THE MARKET NATIONAL BANK OF CHICAGO } Assumpsit.
ats.
LEANDER J. McCORMICK. }

And the defendant, by Duncan & Gilbert, its attorneys, comes and defends the wrong and injury when, etc., and says that it did

not undertake or promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country, etc.

DUNCAN & GILBERT,
Defendant's Attorneys.

And afterwards, to wit, on the 27th day of June, A. D. 1895, there was filed in the office of the clerk of said court a certain similiter, which is in words and figures as follows, to wit:

6 STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County.

LEANDER J. McCORMICK
vs.
MARKET NATIONAL BANK OF CHICAGO.

And the said plaintiff as to the plea of said defendant by it above pleaded and whereof it has put itself upon the country doth the like.

PENCE & CARPENTER,
Attorneys for Plaintiff.

And afterwards, to wit, on the second day of July, A. D. 1895, the same being one of the days of the July term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

LEANDER J. McCORMICK
vs.
MARKET NATIONAL BANK. } 166,952. Assumpsit.

On motion of plaintiff's attorneys, it is ordered that all papers and proceedings in said cause be, and are hereby, amended by changing the name of the defendant to Market National Bank of Chicago, Illinois.

And afterwards, to wit, on the 16th day of July, A. D. 1895, the same being one of the days of the July term of said court, the following, among other, proceedings were had in said court and entered of record, to wit:

7 LEANDER J. McCORMICK
vs.
MARKET NATIONAL BANK OF CHICAGO, ILLINOIS. } 166,952. Assumpsit.

On the agreement of the parties to this suit now here made in open court this cause is submitted to the court for trial without a jury, and the court now here, after hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises,

finds the issues for the plaintiff, and assesses his damages at the sum of twenty-five hundred and forty-eight dollars and thirty-five cents.

Whereupon the plaintiff submits herein his motion for a new trial in said cause. After arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages $2,548.35 of twenty-five hundred and forty-eight dollars and thirty-five cents in form as aforesaid by the court assessed, together with his costs and charges in this behalf expended, and have execution therefor.

Thereupon the plaintiff, having entered his exceptions herein, prays an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed upon filing his appeal bond in the sum of two hundred and fifty dollars, to be approved by the clerk of this court, without surety, within ten days from this date, and leave given the plaintiff to file his bill of exceptions within ten days from this date.

And afterwards, to wit, on the 22nd day of July, A. D. 1895, there were filed in the office of the clerk of said court certain bill of exceptions and appeal bond, which are in words and figures as follows, to wit:

8 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court Thereof, July Term, A. D. 1895.

LEANDER J. McCORMICK
vs.
THE MARKET NATIONAL BANK OF CHICAGO. } Assumpsit. General Number, 166,952. Term No., 18033.

Be it remembered that upon the trial of the above-entitled cause before the court without a jury, a trial by jury having been waived by agreement of the parties, the plaintiff, to maintain the issues on his part, read in evidence a stipulation in the words and figures following, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court Thereof, June Term, A. D. 1895.

LEANDER J. McCORMICK
v.
THE MARKET NATIONAL BANK OF CHICAGO. } Assumpsit.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that a trial by jury in said cause shall be waived and said cause submitted to the court for trial upon the fol-

lowing facts, which, for the purposes of said trial, are to be taken as true: On the 31st day of January, A. D. 1893, Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger, and Seymour Walters, for the purpose of forming a national banking association under the laws of the United States, entered into articles of association; which said articles were duly forwarded by them to the Comptroller of the Currency of the United
9 States and were by him duly filed in his office on the 3rd day of February, A. D. 1893, and were and are in the words and figures following, to wit:

Instructions.—Read Carefully.

The persons uniting to organize a national bank must be natural persons—that is, individuals who can legally hold and control property in their individual right, and not corporations, firms, or associations of any kind.

The proportion of capital required for organization (*i. e.*, one-half) must be paid in cash, and each subsequent monthly installment must be so paid until all the capital is paid in. Promissory notes must not be taken in payment for subscription for capital stock.

Five persons at least are required to sign the articles of association, and those that sign the articles must also sign the organization certificate on the third page, and make proper acknowledgment on the fourth page of said certificate.

The "articles of association," "organization certificate," and "certificate of officers and directors," must be executed in duplicate. One copy must be filed in the office of the Comptroller of the Currency, and one copy in the bank. By carefully following these instructions, delays will be avoided.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking under the laws of the United States, the undersigned subscribers for the stock of the association hereinafter named do enter into the following articles of association:

First. The name and title of this association shall be "The Market National Bank of Chicago, Illinois."

10 Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be Chicago, Cook county, Illinois.

Third. The board of directors shall consist of fifteen shareholders and the following persons:

Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Conway W. Hillman, George B. Reeve, Arthur M. Barnhart, John Cudahy, Charles E. Simmons, Seneca D. Kimbark, David A. Kohn, Simeon H. Busey, Henry S. Boutell, William Cox, Charles D. Seeberger, and Charles G. Blanden having been duly elected directors

of this association to hold their offices as such until the regular annual election takes place, pursuant to the fourth article of these articles of association, and until their successors are chosen and have qualified.

Fourth. The regular annual meetings of the shareholders for the election of directors shall be held at the banking-house of this association on the second Tuesday of January, of each year: but if no election shall be held on that day, may be held on any other day according to the provisions of section 5149 of the Revised Statutes of the United States, and all elections shall be held according to such regulations as may be prescribed by the board of directors not inconsistent with the provisions of the national banking law and of these articles.

Fifth. The capital stock of this association shall be one million dollars, to be divided into shares of one hundred dollars each; but the capital may, with the approval of the Comptroller of the Currency, be increased at any time by shareholders owning two-
11 thirds of the stock, according to the provisions of an act of Congress approved May 1st, 1886; and in case of the increase of the capital of the association each shareholder shall have the privilege of subscribing for such numbers of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors, a majority of whom shall be a quorum to do business, shall elect one of its members president of this association who shall hold his office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director. The director shall have power to elect a vice-president, who shall also be a member of the board of directors, and who shall be authorized, in the absence or inability of the president from any cause to perform all acts and duties pertaining to the office of president except such as the president only is authorized by law to perform, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association: to fix the salaries to be paid to them, and continue them in office or to dismiss them as, in the opinion of a majority of the board, the interests of the association may demand.

The directors shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held; and to appoint judges of the elections; to make all by-laws that may be proper for them to make not incon-
sistent with law, for the general regulation of the business of
12 the association and the management of its affairs, and generally to do and perform all acts that it may be legal for a board of directors to do and perform under the Revised Statutes aforesaid.

Seventh. This association shall continue for the period of twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its share-

holders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These articles of association may be changed or amended at any time by shareholders owning a majority of the stock of the association, in any manner not inconsistent with law; and the board of directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose, not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city or county where the bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting.

In witness whereof, we have hereunto set our hands, this thirty-first day of January, eighteen hundred and ninety-three.

1. ANTHONY F. SEEBERGER, *Chicago, Illinois.*
2. JULLIUS S. GRINNELL, *do.*
3. CHARLES H. FERGUSON, *do.*
4. SIMION H. BUSEY, *Urbana, Ills.*
5. CONWAY H. HILLMAN, *Chicago, Ills.*
6. WILLIAM COX, " "
7. CHARLES G. BLANDEN, " "
8. CHARLES D. SEEBE-GER, " "
9. SEYMOUR WALTON, " "

13 I certify that the articles of association of the Market National Bank of Chicago are executed in duplicate; that one of the instruments so executed is the foregoing, and that the other, in all respects like the foregoing, is on file with said bank.

(Signed) WILLIAM COX, *Cashier.*

Chicago, January 31st, 1893.

On the same day said Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Simion H. Busey, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger, and Seymour Walters did, under their hands, make an organization certificate, which said certificate was on the same day duly acknowledged before a notary public, and was, together with the acknowledgement thereof, authenticated by the seal of said notary, transmitted to the Comptroller of the Currency of the United States, who received the same on the 3rd day of February, A. D. 1893, and duly recorded and carefully preserved the same in his office on said 3rd day of February, A. D. 1893; which said certificate was and is in the words and figures following, to wit:

Instructions.—Read Carefully.

The association will have succession for the period of twenty years from the date of the execution of the organization certificate.

The name, etc., of each shareholder, but not necessarily his signature, is required upon the second page. Each person that signs the articles of association is also required to sign the organization certificate upon the third page.

"The organization certificate" must be acknowledged before a judge of a court of record or before a notary public having a
14 seal, and all the shareholders that sign on the third page must make proper acknowledgment on the fourth page.

The "articles of association," "organization certificate" and "certificate of officers and directors" should be executed in duplicate. One copy of each must be filed in the office of the Comptroller of the Currency and one in the bank. By carefully following these directions delays will be avoided.

Organization Certificate.

We, the undersigned, whose names are specified in article fourth of this certificate, having associated ourselves for the purpose of organizing an association for carrying on the business of banking, under the laws of the United States, do make and execute the following organization certificate:

First. The name of the association shall be "The Market National Bank of Chicago."

Second. The said association shall be located in the city of Chicago, county of Cook and State of Illinois, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be one million dollars ($1,000,000.00) and the same shall be divided into ten thousand shares of one hundred dollars each.

Fourth. The name and residence of each of the shareholders of this association, with the number of shares held by each, are as follows:

15 Name.	Residence.	No. of shares.
1. Anthony F. Seeberger	Chicago, Ills.	250
2. Julius S. Grinnell	Chicago, Ills.	20
3. Sineon H. Busey	Urbana, Ills.	100
4. Charles H. Ferguson	Chicago, Ills.	250
5. Conway W. Hillman	" "	200
6. William Cox	" "	25
7. Charles G. Blanden	" "	9,095
8. Charles D. Seeberger	" "	10
9. Seymour Walton	" "	50
Total		10,000

Fifth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid laws of the United States.

In witness whereof, we have hereunto set our hands this thirty-first day of January, 1893.

1. ANTHONY F. SEEBERGER.
2. JULIUS S. GRINNELL.
3. SIMEON H. BUSEY.
4. CHARLES H. FERGUSON.
5. CONWAY W. HILLMAN.
6. WILLIAM COX.
7. CHARLES G. BLANDEN.
8. CHARLES D. SEEBERGER.
9. SEYMOUR WALTON.

STATE OF ILLINOIS, } ss:
County of Cook, }

On this the thirty-first day of January, A. D. 1893, before
16 me, a notary public of Cook county and State of Illinois, personally came Anthony F. Seeberger, Julius S. Grinnell, Simeon H. Busey, Charles H. Ferguson, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger, and Seymour Walton, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office thirty-first of January and year aforesaid.

(Signed) JOHN KIDSTON,
Notary Public.

(Seal of notary or of court.)

At a meeting of the directors of said Market National bank, chosen by the shareholders thereof and named in said articles of association, which said meeting was held on the 31st day of January, A. D. 1893, said A. F. Seeberger was duly elected president of said bank and William Cox was duly elected cashier thereof.

On the 9th day of February, A. D. 1893, the said A. F. Seeberger, in the name of said Market National bank and as president thereof, in pursuance of a resolution of the board of directors of said Market National bank, purporting by its terms to authorize him so to do, entered into a lease in writing with said Leander J. McCormick of certain premises to be used as a banking-room and place of business by said Market National bank; which said lease with certain papers attached thereto were and are in the words and figures following, to wit:

This is to certify, that I, Leander J. McCormick, of the city of Chicago, county of Cook and State of Illinois, have demised and leased, and do hereby demise and lease unto the Market National Bank of Chicago, the offices now occupies by the Hide and
17 Leather bank and Mess. R. S. Critchell & Co., not including office No. 4 on the first story of the building known as the Major block situated on the S. E. corner of Madison and La Salle streets in the city of Chicago, State of Illinois, to be used and occupied by said Market National bank as a banking office and for no other purpose for the term of five years from the 1st day of May,

1893, to the 30th day of April, 1898, at the yearly rent of thirteen thousand $\frac{0\,0}{1\,0\,0}$ ($13,000) dollars, payable in equal installments of one thousand, eighty-three $\frac{3\,3}{1\,0\,0}$ ($1,083.33) dollars (in gold or its equivalent) monthly on the last day of each and every month during and for the said term, at the office of Leander J. McCormick, in Chicago, or such other place in Chicago as the lessor may direct.

And it is a condition of this letting, that the said lessee shall not assign this lease agreement, nor let or underlet said rooms, or any part thereof, nor use the same or permit the same to be used for any other purpose than as above described, nor make any alterations therein without written consent of the lessor first had and obtained, and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease; and further, that all personal property in the demised premises shall be at risk of lessee only, and lessor shall not be liable for any damage to said personal property, to said premises or to said lessee, arising from bursting of water or steam pipes, or from any acts or neglect of cotenants or other occupants of the building or any other persons, and that the rules and regulations in regard to said building which are printed on the other side hereof, shall during the continuance of this agreement, be in all things observed and performed by the said lessee and his clerks and servants, and shall constitute and form a part of this lease.

18 It is also agreed that the lessee shall be furnished free of charge with heat from 8 a. m. until 6 p. m. Sundays and legal holidays excepted, from October 1st until May 1st, from the apparatus for heating in the building and it is understood and agreed that if, during the continuance of this agreement, the said premises shall be so injured by fire as to be rendered untenantable, then in case such injury shall not be repaired by the lessor within thirty days thereafter, it shall be optional with either party, to cancel this agreement, and in case of any such cancellation, the rent shall be paid to the day of such fire, and no rent shall be collectable while the rooms are untenantable.

In witness whereof, I have hereunto set my hand and seal this 9th day of February, one thousand eight hundred and ninety-three.

(Signed) LEANDER J. McCORMICH, [SEAL.]
By R. H. McC.

Sealed and delivered in the presence of—

——— ———.

This is to certify that we, the Market National Bank of Chicago, have hired and taken from Leander J. McCormick, the room referred to in the foregoing instrument, at the rent and upon the other terms and conditions therein mentioned and set forth; and we hereby agree with said Leander J. McCormick to make punctual payments of the said rent as provided in the said instrument, and to do, observe and perform in all things the conditions and agreements therein set forth, to be observed and performed by us, and if default

be made in the payment of rent or of any part thereof by us
19 such default shall of itself constitute a forfeiture of said lease and a forcible detainer, and in case of such default or of a default in the performance of any of said conditions and agreements or either of them, said Leander J. McCormick or his agent may re-enter the said premises and remove all persons therefrom forcibly or otherwise and all damages arising from so doing are hereby waived and we hereby expressly waive any demand for such rent so in default or for the possession of said premises, or of notice of any intention to re-enter, prescribe- by any statute or law whatever, but re-entry may be made, or suit in forcible detainer, ejectment or otherwise for possession of said premises may be maintained in consequence of any such default without any demand or notice prescribed by any statute or law whatever.

Said lessor shall have the right to alter, add to, improve or repair said building in which said room or rooms are located at any time, and he or his agent or employés shall have the right to enter said room or rooms at all reasonable hours to examine the same, or to make such repairs, additions or alterations as may be necessary for the safety, improvement or preservation thereof, or of said building, and we hereby releases said Leander J. McCormick from all claims for damages caused in the past or that may be caused in the future by any alterations to said building or room or rooms. And we hereby consent that said Leander J. McCormick or his agent may exhibit the said premises, and put and keep upon the doors or windows thereof a notice "For rent" at any time within three months before the expiration of this lease.

Witness our hands and seals this 9th day of February, 1893.

MARKET NATIONAL BANK, [SEAL.]
Per A. F. SEEBERGER, *President.* [SEAL.]

[Seal Market National Bank, Chicago, Ill.]

Attest: WILLIAM COX, *Cashier.*

Sealed and delivered in presence of—

MARK M. FOOTE.

20 *Guarantee.*

In consideration that the above-written lease was executed and delivered to the above-named lessee at — request, and in further consideration of one dollar by — received of the above-named lessor — hereby guarantee to the said lessor, his heirs and assigns, the performance by the said lessee, — executors, administrators and assigns, of all the agreements and covenants in the said lease contained by the said lessee, — executors, administrators and assigns to be kept and performed.

——, —— —, 189–.

—— ——. [SEAL.]

Assignment and Acceptance.

For value received, — hereby assign all — right, title and interest in and to the within lease unto —— —— heirs, and assigns, and in consideration of the consent to this assignment by the lessor, — guarantee the performance by said —— —— of all the covenants on the part of the second party in said lease mentioned.

In consideration of the above assignment and written consent of the party of the first part thereto — hereby assume and agree to make all the payments and perform all the covenants and conditions of the within lease, by said party of the second part to be made and performed.

Witness — hand– and seal– this — day of —— A. D. 189–.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

21 *Consent to Assignment.*

— hereby consent to the assignment of the within lease to —— —— on the express condition however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as herein mentioned, and that no further assignment of said lease or subletting of the premises, or any part thereof, shall be made without —— —— written assent first had thereto.

Witness — hand and seal this — day of ——, A. D. 189–.

—— ——. [SEAL.]

Rules and Regulations Referred to Within.

1. The entries, passages, stairways and elevators shall not be obstructed by any of the tenants, or used by them for any other purpose than ingress and egress to and from their respective rooms. No bulky articles shall be carried up or down the building except on the elevator and then at such hours as the janitor may appoint.

2. ——.

3. The water-closets and other water fixtures shall not be used for any purpose other than those for which they were constructed, and any damage resulting to them from misuse or the defacing or injury of any part of the building shall be borne by the tenant who shall occasion it.

4. The light through the transoms opening into the halls shall not be obstructed by the lessee.

5. No tenant, his clerks or servants, shall use said rooms for sleeping purposes or disturb the other tenants by the use of
22 any musical instruments, any unseemly noises or by any interference in any way. Dogs or other animals shall not be allowed in the building.

6. No dust, rubbish or litter shall be swept from any room into any of the halls, except under the directions of the janitor; nor

shall the same nor anything else be thrown or emptied from any of the windows of said building.

7. All tenants and occupants must observe strict care not to leave their windows open when it rains or snows; and for any default or carelessness in this respect shall make good all injury sustained by other tenants, and to the owner for damage to the paint, plastering or other parts of the building resulting from such default or carelessness.

8. ——.

9. ——.

10. All necessary keys will be furnished by lessor, to be returned by lessee at end of lease. Lessee will not have any duplicate keys made.

11. If lessee desires awnings or shades at the windows, to be erected at lessee's expense, they must be of such uniform shape, color, material and make as may be prescribed by the agent of the building.

12. ——.

13. Furniture and packages required to be taken up in the elevator must be first unpacked in the room designated for that purpose by the janitor, and carried through the building at such hours as the janitor may appoint.

14. No additional locks shall be placed upon any doors of the building without the written consent of the lessor first obtained and endorsed upon this lease.

23 15. The rent of an office will include occupancy of office, water in standing bowls, steam heat and elevator service from 8 a. m. to 6 p. m. Sundays and legal holidays excepted, but lessor shall not be liable for any damages from the stoppage of the steam apparatus or elevator for necessary or desirable repairs or improvements.

16. The lessor reserves the right to enter upon any premises vacated by the lessee before the termination of lease, to make repairs or alterations.

17. The lessor reserves the right to make such other and further reasonable rules and regulations as in his judgment may from time to time be needful for the safety, care, and cleanliness of the premises, and for the preservation of good order therein.

CHICAGO, ——, 189–.

Received from Leander J. McCormick — keys, being a complete set of keys to the premises referred to in the within lease.

—— ——.

(Endorsement:) Lease, Major building. Lessee, the Market National Bank of Chicago. Banking office. From May 1st, 1893, to April 30th, 1898. Yearly rental, $13,000; monthly rental, $1,083.33.

24 The following was attached to said lease:

Leander J. McCormick, 84 La Salle St., Chicago.

In connection with the lease hereto attached it is further understood and agreed:

That the lessor, Leander J. McCormick, shall make the following alterations and repairs at his expense, to wit:

New plate-glass window to be put in at the corner of contrance, all windows to be replaced with large lights of plate-glass with transom over each, a large window or entrance to be put in at the head of the main stairs. Interior of bank office to be painted or grained in imitation of oak, and room is to be papered in good style, new hard-wood floor to be put down in the working portion of bank and white marble or other tile to be put down for floor in public portion of the office.

Steam radiators to be put in where needed and neat combination gas and electric fixtures and wiring to be put in where required. Exterior of building to be painted before July 1st, 1893. No charge for steam heat, but electric light and gas to be paid for by the bank. Space just east of the east vault is to be made into a good water-closet for bank employés. And it is further understood and agreed:

That both landlord and tenant can cancel this lease by either party giving ninety (90) days' prior notice in writing to the other of desiring termination of said lease on May 1st, of 1895, 1896 or 1897. The lessee shall have the privilege of subletting the Critchell office, if they so desire subject to the other conditions of the lease. No charge for rent to be made until lessee takes possession of the premises.

MARKET NATIONAL BANK, [SEAL.]
Per A. F. SEEBERGER, *President.* [SEAL.]
LEANDER J. McCORMICK,
By R. H. McC.

25 [Seal Market National Bank, Chicago, Illinois.]

Chicago, February 9th, 1893.

The following was attached to said lease:

Treasurer's office of the World's Columbian Exposition, A. F. Seeberger, treasurer, room 458, No. 160 Adams St.

CHICAGO, *April 12th*, 1893.

Leander J. McCormick, Esq., 84 La Salle St., city.

DEAR SIR: Referring to your communication of even date regarding the changes to be made in the vaults in the banking-room, known as the "Hide & Leather bank," and the Critchell & Company's offices, immediately adjoining said banking-room on the south and which the Market National bank have rented from you under lease dated February 9th, 1893, would say that the condi-

tions therein contained are hereby accepted and will be attached to the lease executed by you to the Market National bank.

Yours respectfully,

MARKET NATIONAL BANK,
By A. F. SEEBERGER, *President.*

The following was attached to said lease:

26 Leander J. McCormick, 84 La Salle St., Chicago.

The Market National bank, Chicago, Ill.

GENTLEMEN: Recognizing the fact that it is difficult for you to divide up your office in a suitable manner, I wish to suggest that the west two vaults heretofore used by the Hide & Leather bank and Critchell & Co. and the partition wall between the two offices be entirely removed on the first story and a new vault be arranged in the small south office heretofore occupied by Critchell & Co. and known as room #4. The new vault referred to is to be constructed by bricking up with cement all openings in room #4 and a new twelve-inch wall to be built inside of said room, leaving a four-inch air space between the present wall and the one to be erected. The ceiling and floor of vault to be used by the bank is to be constructed with "I" beams and brick arch. In order to show my liberality in the premises, I will hereby agree to make the proposed changes provided you will pay one-half the cost of said changes. I will make no charge for the office until such changes are completed.

Yours truly, LEANDER J. McCORMICK,
By R. HALL McCORMICK.

We propose to do the above work for $2,475.00.

ANGUS & GINDELE.

27 Subsequently calls were made by the board of directors of said Market National bank upon the shareholders thereof for payments on account of their subscriptions to the said capital stock. A portion of the said shareholders never paid any portion of their subscriptions, while others paid a portion of the amount called for and others paid the entire amount due upon their subscriptions. Of the entire capital stock of $1,000,000 provided for in said articles of association, no more than the sum of $331,594 was ever paid in.

On the 22nd day of June, A. D. 1893, the said president and cashier of said Market National Bank of Chicago in the name of said Market National Bank of Chicago took possession of the premises demised and leased to it under said lease hereinbefore mentioned, the said premises not having been until that time ready for occupancy and the possession thereof having until then been retained by said Leander J. McCormick, with the full consent and approval of the officers of said bank, for the purpose of putting said demised premises in a condition suitable for the occupation and use of said Market National Bank of Chicago, which the said Leander J. McCormick did do in manner provided in said lease, and the said cashier

of said Market National Bank of Chicago on said day paid to said Leander J. McCormick the rent accruing under said lease down to the 22nd day of July, A. D. 1893.

Said Market National Bank of Chicago never was authorized by the Comptroller of the Currency to commence the business of banking, and never did commence the business of banking.

The said Leander J. McCormick, at the time of the negotiations prior to the execution of said lease, and at the time of the execution of said lease, and at the time when said officers of said Market National Bank of Chicago took possession of the demised premises on the 22d day of June, A. D. 1893, understood and believed
28 that said Market National Bank of Chicago was duly and legally organized as a national bank, and that as such it was ready to do a banking business, and that it had the power to enter into said lease and the agreements connected therewith, and had no knowledge or information to the contrary until the 15th day of August, A. D. 1893, at which time the officers of the said Market National Bank of Chicago informed said McCormick that said Market National Bank of Chicago had no power to enter into said lease, and offered to surrender to said McCormick said demised premises and said lease, and the said McCormick was then and there informed by the said officers of said Market National Bank of Chicago that said Market National Bank of Chicago had never been authorized by the Comptroller of the Currency to commence the business of banking, but nevertheless said McCormick then and there refused to accept such surrender.

After the execution of said lease it was agreed by and between the officers of said Market National Bank of Chicago and said Leander J. McCormick, in pursuance of a resolution of the board of directors of said Market National Bank of Chicago, purporting by its terms to authorize the same, that the said Market National Bank of Chicago would pay one-half of the cost of changing the offices and building the vault, &c., in said demised premises, and thereafter said premises were changed, in accordance with said agreement, by said Leander J. McCormick at a cost of $2,475, which was paid by him and no part of which was ever repaid to him by said Market National Bank of Chicago, said agreement having been entered into and said charges having been made prior to the 22nd day of June, A. D. 1893.

Prior to the execution of said lease officers of said Market National Bank of Chicago were elected by its board of directors,
29 who also caused a seal to be made for said bank. The name of said bank was signed to said lease by its president and its corporate seal was attached thereto. The officers of said Market National Bank of Chicago from time to time, signing themselves in their official capacity, corresponded with said Leander J. McCormick, using in such correspondence letter-heads or stationary with the name of the Market National bank, its location and place of business, and the name- of its officers printed thereon, and said letters were signed either by the president or by the cashier of said bank.

The officers of said Market National Bank of Chicago, after having taken possession of the premises demised and leased to it and during the month of June, A. D. 1893, put into said premises the necessary fixtures and furniture required to carry on a banking business, and also a quantity of blank books and stationery suitable for uses in carrying on a banking business, which said fixtures, furniture, blank books, and stationery so placed in said premises were not removed therefrom until the 30th day of April, A. D. 1895.

On the 20th day of September, A. D. 1893, the said A. F. Seeberger caused to be left with E. Hall McCormick, the duly authorized agent of said Leander J. McCormick, the key to said banking office by throwing the same upon the desk of said R. Hall McCormick or upon the desk of some one in his presence, but the said R. Hall McCormick at that time refused to accept the same or to accept the surrender of said lease. Said key was, however, left by said Seeberger in the office of said R. Hall McCormick.

On the 4th day of October, A. D. 1893, an agreement was entered into, in pursuance of which said Leander J. McCormick ever since said date has had and retained possession of said premises mentioned in said lease; which said agreement was and is in the words and figures following, to wit:

30 This agreement, made this fourth day of October, A. D. 1893, by and between the Market National Bank of Chicago, Illinois, party of the first part, and Leander J. McCormick, of Chicago, Illinois, party of the second part, witnesseth: That

Whereas, a controversy exists between said parties in reference to the liability of said first party for rent of the offices in the Major Block formerly occupied by the Hide and Leather bank and Messrs. R. S. Critchell & Co. (not including office No. 4) at the southeast corner of Madison & La Salle streets in Chicago, Illinois, under a certain instrument dated February 9th, 1893, and purporting to be a lease executed by said parties, and

Whereas, it is the desire of both of said parties pending the settlement of said controversy, either by suits or otherwise, that said offices should not remain vacant and the rent thereof be wholly lost:

Now, therefore, in consideration thereof, it is agreed by and between the parties that said party of the second part shall take possession of said offices and use his best endeavors to lease the same on such terms as may be satisfactory to both parties and collect the rent thereof, and that such taking possession and leasing of said offices shall not, nor shall anything herein contained, prejudice either of said parties in respect to said controversy, nor in any manner affect the rights of either party, excepting that in case said party of the second part shall ultimately establish a right to hold said party of the first part liable for the rent of said offices, the amount of rent provided for by said lease that may be made by said party of the second part in pursuance of this agreement shall be applied to reduce *pro tanto* such liability of said party of the first part.

31 In witness whereof, said party of the second part has hereunto set his hand, and said party of the first part has caused its name to be signed by its president the day and year first above written.

MARKET NATIONAL BANK,
By A. F. SEEBERGER, *President.*
LEANDER J. McCORMICK.

We, the undersigned, a committee appointed at a meeting of the directors of the Market National bank, held July 22d, 1893, to settle the outstanding indebtedness of said Market National bank, do hereby, in our own behalf as well as in behalf of all other persons interested therein, approve of the foregoing agreement this 4th day of October, A. D. 1893. This approval, however, is not to be construed, used, or taken as any acknowledgement of our liability upon said lease in said agreement mentioned.

A. F. SEEBERGER.
A. M. BARNHART.

I assent to the foregoing and agree that I will not use the same to create any liability against said Seeberger and Barnhart or either of them that would not exist had they not signed their name thereto.

LEANDER J. McCORMICK.

That said Leander J. McCormick made every effort to rent and obtain a tenant for said premises, pursuant to the above agreement, and was unable so to rent them or obtain a tenant for them.

On the 11th day of August, A. D. 1893, said Leander J. McCormick was duly notified by said A. F. Seeberger of the abandonment of all further proceedings with respect to the carrying on by said Market National Bank of Chicago of a banking business, and that said Market National Bank of Chicago would not occupy the
32 same premises demised in said lease, and that he, said Leander J. McCormick, was at liberty at any time to take possession of said premises; but nevertheless, ever since said date and down to the first day of May, A. D. 1895, said Leander J. McCormick has refused to accept a surrender of said lease, and said Market National Bank of Chicago has refused to occupy the demised premises thereunder or to pay the rent provided for in said lease and accruing subsequent to July 22nd, 1893, and said demised premises thereafter remained vacant and unoccupied until October 4, A. D. 1893, when they were taken possession of by said Leander J. McCormick in pursuance of the agreement of October 4, A. D. 1893, hereinbefore mentioned.

On the 15th day of July, A. D. 1893, the said Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Simon H. Busey, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger, and Seymour Walters executed and signed a certificate revoking the above-mentioned articles of association and organization certificate and transmitted the same to the Comptroller of the Currency, who received and placed the same on file in his office.

On the same day Anthony F. Seeberger, William Cox, Conway W. Hillman, Arthur M. Barnhart, George W. Reeve, Charles H. Ferguson, Julius S. Grinnell, Henry S. Boutell, John Cudahy, David A. Kohn, John A. Sweet, and De Forest Skinner, for the purpose of forming a national banking association under the laws of the United States, entered into articles of association; which said articles were duly forwarded to the Comptroller of the Currency of the United States and were by him filed in his office on the 18th day of July, A. D. 1893, and were and are in the words and figures following, to wit:

33 *Instructions.—Read Carefully.*

The persons uniting to organize a national bank must be natural persons—that is, individuals who can legally hold and control property in their individual right, and not corporations, firms, or associations of any kind.

The proportion of capital stock required for organization (*i. e.*, one-half) must be paid in cash, and each subsequent monthly installment must be so paid until all the capital is paid in. Promissory notes must not be taken in payment for subscriptions to capital stock.

Five persons at least are required to sign the articles of associations, and those that sign the articles must also sign the organization certificate on the third page, and make proper acknowledgement on the fourth page of said certificate.

The "articles of association," "organization certificate," and "certificate of officers and directors," must be executed in duplicate. One copy must be filed in the office of the Comptroller of the Currency and one copy in the bank. By carefully following these instructions, delays will be avoided.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking, under the laws of the United States, the undersigned subscribers for the stock of the association hereinafter named do enter into the following articles of association:

First. The name and title of this association shall be "The Market National Bank of Chicago, Illinois."

34 Second. The place where its banking house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted, shall be Chicago, Cook county, Illinois.

Third. The board of directors shall consist of not less than nine nor more than twenty-one shareholders. And the following persons: Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Conway W. Hillman, George B. Reeve, Arthur M. Barnhart, John Cudahy, David A. Kohn, Simeon H. Busey, Henry S. Boutell, John A. Sweet, and De Forest Skinner have been duly elected directors of this association, to hold their offices as such until the regular annual election takes place, pursuant to the fourth articles of these

articles of association, and until their successors are chosen and have qualified.

Fourth. The regular annual meetings of the shareholders for the election of directors shall be held at the banking-house of this association on the second Tuesday of January of each year: but if no election shall be held on that day, it may be held on any other day, according to the provisions of section 149 of the Revised Statutes, and all elections shall be held according to such regulations as may be prescribed by the board of directors, not inconsistent with the provisions of the national banking law, and of these articles.

Fifth. The capital stock of this association shall be five hundred thousand dollars, to be divided into shares of one hundred dollars each; but the capital may, with the approval of the Comptroller of the Currency, be increased at any time by shareholders owning two-thirds of the stock, according to the provisions of an act of Congress approved May 1, 1886; and in case of the increase of the capital of the association, each shareholder shall have the
35 privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors, a majority of whom shall be a quorum to do business, shall elect one of their members president of this association, who shall hold his office (unless he shall be disqualified, or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director. The directors shall have power to elect a vice-president who shall also be a member of the board of directors, and who shall be authorized, in the absence or inability of the president from any cause, to perform all acts and duties pertaining to the office of president except such as the president only is authorized by law to perform, and to elect or appoint a cashier, and such other officers and clerks as may be required to transact the business of the association: to fix the salaries to be paid to them, and continue them in office or to dismiss them as, in the opinion of a majority of the board, the interests of the association may demand.

The directors shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to make all by-laws that it may be proper for them to make not inconsistent with law, for the general regulation of the business of the association and the management of its affairs, and generally to do and perform all acts that it may be legal for a board of directors to do and perform under the Revised Statutes aforesaid.

Seventh. This association shall continue for the period of
36 twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These articles of association may be changed or amended

at any time by shareholders owning a majority of the stock of the association, in any manner not inconsistent with law; and the board of directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose, not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city or county where the bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting.

In witness whereof, we have hereunto set our hands, this — day of —— eighteen hundred and ninety —.

1. ANTHONY F. SEEBERGER, *Chicago, Illinois.*
2. WILLIAM COX, " "
3. CONWAY W. HILLMAN, " "
4. ARTHUR M. BARNHART, " "
5. GEO. B. REEVE, " "
6. CHAS. H. FERGUSON, " "
7. JULIUS S. GRINNELL, " "
8. HENRY S. BOUTELL, " "
9. JOHN CUDAHY, " "
10. DAVID A. KOHN, " "
11. JOHN A. SWEET, " "
12. DE FOREST SKINNER, *Valparaiso, Ind.*
13. (Mr. Busey to sign.)

37 I certify that the articles of association of the Market National Bank of Chicago, Ills., are executed in duplicate; that one of the instruments so executed is the foregoing, and that the other, in all respects like the foregoing, is on file with said bank.

(Signed) WILLIAM COX, *Cashier.*

July fifteenth, 1893.

On the 15th day of July, A. D. 1893, the same persons, together with Charles G. Blanden, did, under their hands, make an organization certificate, which said certificate was duly acknowledged before a notary public, and was, together with the acknowledgement thereof, authenticated by the seal of said notary, transmitted to the Comptroller of the Currency of the United States, who received the same on the 20th day of July, A. D. 1893, and duly recorded the same in his office, and said certificate was and is in the words and figures following, to wit:

Instructions.—Read Carefully.

The association will have succession for the period of twenty years from the date of the execution of the organization certificate.

The name, etc., of each shareholder, but not necessarily his signature, is required upon the second page. Each person that signs the articles of association is also required to sign the organization certificate upon the third page.

"The organization certificate" must be acknowledged before a

judge of a court of record or before a notary public having a seal, and all the shareholders that sign on the third page must make proper acknowledgement on the fourth page.

The "articles of association," "organization certificate" and "certificate of officers and directors" should be executed in du-
38 plicate. One copy of each must be filed in the office of the Comptroller of the Currency and one in the bank. By carefully following these directions, delays will be avoided.

Organization Certificate.

We, the undersigned, whose names are specified in article fourth of this certificate, having associated ourselves for the purpose of organizing an association for carrying on the business of banking, under the laws of the United States, do make and execute the following organization certificate:

First. The name of the association shall be "The Market National Bank of Chicago."

Second. The said association shall be located in the city of Chicago, county of Cook and State of Illinois, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be five hundred thousand dollars ($500,000.00) and the same shall be divided into five thousand shares of one hundred dollars each.

Fourth. The name and residence of each of the shareholders of this association, with the number of shares held by each, are as follows:

Name.	Residence.	No. of shares.
Anthony F. Seeberger	Chicago, Illinois	250
William Cox	" "	25
Conway W. Hillman	" "	200
Arthur M. Barnhart	" "	150
Geo. B. Reeve	" "	100
Charles H. Ferguson	" "	250
39 Henry S. Boutell	Chicago, Illinois	100
John Cudahy	" "	100
Simeon H. Busey	Urbana, "	100
David A. Kohn	Chicago, "	100
John A. Sweet	" "	50
Julius S. Grinnell	" "	20
De Forest Skinner	Valparaiso, Ind	100
Charles G. Blanden	Chicago, Illinois	3,455
		5,000

Fifth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid laws of the United States.

In witness whereof, we have hereunto set our hands this, fifteenth day of July, 1893.

ANTHONY F. SEEBERGER.
WILLIAM COX.
CONWAY W. HILLMAN.
ARTHUR M. BARNHART.
GEO. B. REEVE.
CHAS. H. FERGUSON.
HENRY S. BOUTELL.
JOHN CUDAHY.
SIMEON H. BUSEY.
DAVID A. KOHN.
JOHN A. SWEET.
JULIUS S. GRINNELL.
DE FOREST SKINNER.
CHARLES G. BLANDEN.

40 STATE OF ILLINOIS, } ss:
County of Cook, }

On this the fifteenth day of July, A. D. 1893, before me, a notary public of Chicago, Ills., personally came Anthony F. Seeberger, William Cox, Conway Hillman, Arthur M. Barnhart, Geo. B. Reeve, Chas. H. Ferguson, Henry S. Boutell, John Cudahy, Simeon H. Busey, David A. Kohn, John A. Sweet, Julius S. Grinnell, De Forest Skinner, Chas. G. Blanden, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

WILLIAM H. POWELL,
Notary Public.

(Seal of notary or of court.)

On the 25th day of July, A. D. 1893, the said Anthony F. Seeberger, William Cox, Conway W. Hillman, Arthur M. Barnhart, George W. Reeve, Charles H. Ferguson, Julius S. Grinnell, Henry S. Boutell, John Cudahy, David A. Kohn, John A. Sweet, and De Forest Skinner abandoned all further proceedings with respect to the said organization of said Market National Bank of Chicago, as provided in said articles and certificate last mentioned, and the commencement by said Market National Bank of Chicago of the business of banking, and said Market National Bank of Chicago never was authorized by the Comptroller of the Currency to commence the business of banking, and never did commence the business of banking, nor was any portion of its capital stock ever paid in.

On the 3rd day of January, A. D. 1895, said Leander J. McCormick gave to said A. F. Seeberger, as president of the Market National Bank of Chicago, a notice in writing of the desire
41 and intention of him, the said McCormick, to terminate the said lease on May 1st, 1895, in accordance with the terms thereof.

This suit is brought against the said Market National Bank of Chicago as organized under the articles of association and organization certificate dated January 31, 1893, above mentioned.

The foregoing facts shall be held to be competent evidence under the pleadings in this cause to the same extent that they would be under any form of pleadings, the intention of the parties being that under the pleadings in this cause the respective parties may establish any cause of action or any defense that they could respectively establish under any form of pleadings. If upon the foregoing facts the court is of the opinion that the plaintiff is entitled to recover of and from the defendant, judgment is to be entered in favor of the plaintiff for such sum as the court is of the opinion the plaintiff is entitled to recover of and from the defendant, together with cost of suit; but if, on the contrary, the court is of the opinion that the plaintiff is not entitled to recover of and from the defendant, judgment is to be entered in favor of the defendant and against the plaintiff for costs of suit.

DUNCAN & GILBERT,
Attorneys for Defendant.
PENCE & CARPENTER,
Attorneys for Plaintiff.

20th June, '95.

The foregoing was all the evidence introduced by either party up- the trial of said cause.

The plaintiff, by his attorneys, then asked the court to find as a matter of law in this case the following propositions:

42 1st. That the execution of the lease in question by the defendant was incidental and necessarily preliminary to its organization and to its entering upon a banking business; and the court refused so to find, and the plaintiff's attorneys then and there excepted.

2nd. That the execution of the lease in question was a proper exercise of the powers possessed by such defendant to make contracts under paragraph 3 of section 5136 of the Revised Statutes of the United States; and the court refused so to find, and plaintiff, by his attorneys, then and their excepted.

3rd. That the limitation or last clause of paragraph 7 of said section does not apply to the powers conferred by paragraphs 1 to 6 in said section; that the Market National Bank of Chicago had the power to enter into said lease and to legally bind itself thereby; and the court refused so to find, and plaintiff, by his attorneys, then and there excepted.

4th. That there was no want of power on the part of said defendant to execute said lease, but merely a defective organization, and said bank cannot plead such defective organization to defeat a recovery; and the court refused to find, and plaintiff, by his attorneys, then and there excepted.

5th. That said contract of lease has been fully executed; and the court refused so to find, and plaintiff, by his attorneys, then and there excepted.

6th. That the said plaintiff was not bound to ascertain whether or not the said defendant was properly and legally organized, and that if the plaintiff relied upon the representations and statements of the proper officers of said defendant that the bank was
43 properly and legally organized and empowered to make and enter into said lease he is entitled to recover the stipulated rental named therein, and the defendant is estopped to deny its liability.

And the court refused so to find, and the plaintiff, by his attorneys, then and there excepted.

7th. That the said defendant, by its acts, conduct, and declarations, as shown by the agreed statement of facts in this case, is estopped from alleging that it was not fully organized as a banking corporation under the laws of the United States and from alleging that it did not have the power to execute the lease in question; and the court refused so to find, and the plaintiff, by his attorneys, then and there excepted.

8th. That the plaintiff, under the facts in this case as agreed upon, is entitled to recover judgment, at the rate agreed upon in said lease, from July 22nd, A. D. 1893, up to May 1st, A. D. 1895, and also to recover one-half of the expenses of repairing and changing the said premises according to the stipulation, with interest upon each installment as it became due at the rate of five (5 %) per cent. per annum.

And the court refused so to find, and the plaintiff, by his attorneys, then and there excepted.

And the court refused to hold and find the foregoing propositions as law, or any of them; to which said refusal so to hold and find as law the plaintiff then and there excepted by his attorneys.

Thereupon the court found the issues joined in favor of the plaintiff and assessed his damages at the sum of $2,548.35; to which finding the plaintiff, by his attorneys, then and there excepted.

And the plaintiff then, by Pence & Carpenter, his attorneys, moved the court in writing to grant a new trial herein for the following reasons:

44 1st. That the execution of the lease in question by the defendant was incidental and necessarily preliminary to its organization and to its entering upon a banking business.

2nd. That the execution of the lease in question was a proper exercise of the powers possessed by such defendant to make contracts under paragraph 3 of section 5136 of the Revised Statutes of the United States.

3rd. That the limitation or last clause of paragraph 7 of said section does not apply to the powers conferred by paragraphs 1 to 6 in said section; that the Market National Bank of Chicago has the power to enter into said lease and to legally bind itself thereby.

4th. That there was no want of power on the part of said defendant to execute said lease, but merely a defective organization to defeat a recovery.

5th. That said contract of lease has been fully executed.

6th. That the said plaintiff was not bound to ascertain whether

or not the said defendant was properly and legally organized, and that if the plaintiff relied upon the representations and statements of the proper officers of said defendant that the bank was properly and legally organized and empowered to make and enter into said lease he is entitled to recover the stipulated rental named therein, and the defendant is estopped to deny its liability.

7th. That the said defendant, by its acts, conduct, and declarations, as shown by the agreed statement of facts in this case, is estopped from alleging that it was not fully organized as a banking corporation under the laws of the United States and from alleging that it did not have the power te execute the lease in question.

8th. That the plaintiff. under the facts in this case as agreed upon, is entitled to recover judgment, at the rate agreed upon
45 in said lease, from July 22nd, A. D. 1893, up to May 1st, A. D. 1895, and also to recover one-half of the expenses in repairing and changing the said premises according to the stipulation herein, with interest upon each installment as it became due at the rate of five (5 %) per cent. per annum.

And the court refused to grant and allow such new trial and overruled said motion; to which the said plaintiff, by his attorneys, then and there excepted.

Thereupon the court entered judgment for said sum of $2,548.35 in favor of the plaintiff upon the said finding; to the entering of which said judgment the plaintiff, by his attorneys, then and there excepted.

And forasmuch as the matters and things aforesaid do not appear of record the plaintiff prays that this his bill of exceptions may be signed and sealed, which is done accordingly.

JOHN BARTON PAYNE, [SEAL.]
Judge Sup. Ct.

O K.
DUNCAN & GILBERT,
For Defendant.

Know all men by these presents that *we* I, Leander J. McCormick, of the county of Cook and State of Illinois, *are* held and firmly bound unto the Market National Bank of Chicago, Illinois, also of the same county and State, in the penal sum of two hundred and fifty ($250.00) dollars, lawful money of the United States; for the payment of which, well and truly to be made, *we* bind *ourselves, our* heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness *our* hands and seals this 19th day of July, A. D. 1895.

46 The condition of the above obligation is such that whereas the said Leander J. McCormick did, on the 16th day of July, A. D. 1895, in the superior court of Cook county, in the State aforesaid, and of the July term thereof, A. D. 1895, recover a judgment against the above-named Market National Bank of Chicago, Illinois, for the sum of two thousand five hundred and forty-eight dollars and thirty-five cents, besides cost of suit, from which judgment of the said superior court of Cook county the said Leander J. McCor-

mick has prayed for and obtained an appeal to the appellate court within and for the first district, in said State:

Now, therefore, if the said Leander J. McCormick shall duly prosecute his said appeal with effect and, moreover, pay the amount of the judgment, costs, interests, and damages to be rendered against him in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

LEANDER J. McCORMICK, [SEAL.]
By GEO. A. CARPENTER, [SEAL.]
His Att'y-in-fact.

Approved:
STEPHEN D. GRIFFIN,
Clerk Superior Court of Cook County.

O K.
DUNCAN & GILBERT.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Stephen D. Griffin, clerk of the superior court of Cook county in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the
47 record in a certain cause lately pending in said court, on the law side thereof, wherein Leander J. McCormick was plaintiff and Market National Bank of Chicago, Illinois, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 8th day of August, A. D. [SEAL.] 1895.

STEPHEN D. GRIFFIN, *Clerk.*

8, paid by Pence & C.

Appellate Court of Illinois, First District.

LEANDER J. McCORMICK, Appellant,
vs.
MARKET NATIONAL BANK OF CHICAGO, ILLINOIS, Appellee.

And now comes said Leander J. McCormick, appellant, by Pence & Carpenter, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. The superior court erred in refusing to find as a matter of law that the execution of the lease in question by the Market National Bank of Chicago was incidental and necessarily preliminary to its organization and to its entering upon a banking business.

2nd. The superior court erred in that it refused to find as a matter of law that the execution of the lease in question was a proper exercise of the powers possessed by the Market National Bank of Chicago to make contracts under paragraph 3 of section 5136 of the Revised Statutes of the United States.

48 3rd. The superior court erred in that it refused to hold as a matter of law that the limitation or last clause of para-

graph 7 of said section 5136 of the Revised Statutes of the United States does not apply to the powers conferred by paragraphs 1 to 6 in said section, and that the Market National Bank of Chicago had the power to enter into said lease and to legally bind itself thereby.

4th. The superior court erred in that it refused to find as a matter of law that there was no want of power on the part of said Market National Bank of Chicago to execute said lease, but merely a defective organization, and that said bank cannot plead such defective organization to defeat a recovery.

5th. The superior court erred in that it refused to find as a matter of law that said Leander J. McCormick was not bound to ascertain whether or not the said Market National Bank of Chicago was properly and legally organized, and that if the said McCormick relied upon the representations and statements of the proper officers of said Market National Bank of Chicago that the said bank was properly and legally organized and empowered to make and enter into said lease, he is entitled to recover the stipulated rental named therein and the said Market National bank is estopped to deny its liability.

7th. The superior court erred in that it refused to find as a matter of law that the said Market National bank, by its acts, conduct, and declarations, as shown by the agreed statement of facts in this case, is estopped from alleging that it was not fully organized as a banking corporation under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

49 8th. The superior court erred in that it refused to find as a matter of law that under the facts in this case as agreed upon the said McCormick is entitled to recover judgment, at the rate agreed upon in said lease, from July 22nd, A. D. 1893, up to May 1st, A. D. 1895, and also to recover one-half of the expenses of repairing and changing the said premises according to the stipulation, with interest upon each installment as it became due at the rate of five (5 %) per cent. per annum.

9th. The superior court erred in that it found upon the issues joined in favor of the said McCormick and assessed his damages only in the sum of two thousand five hundred and forty-eight dollars and thirty-five cents.

10th. The superior court erred in that it did not find upon the issues joined in favor of said McCormick and assess his damages the amount of the rent agreed upon in said lease from July 22nd, 1893, up to May 1st, 1895, together with one-half of the expenses of repairing and changing the said premises according to said lease, with interest upon each installment as it became due at the rate of five (5 %) per cent. per annum.

11th. The superior court erred in that it overruled the motion for a new trial made by said McCorkick.

12th. The superior court erred in that it entered judgment upon the findings for said Leander J. McCormick in the sum of only twenty-five hundred and forty-eight dollars and thirty-five cents.

13th. The superior court erred in that it did not enter judgment

upon the findings for the plaintiff in a sum equal to the rent agreed upon in said lease from July 22nd, 1893, to May 1st, 1895, together with one-half of the expenses of repairing and changing the said premises, with interest upon each installment as it became
50 due at the rate of five (5 %) per cent. per annum.

14th. The superior court erred in that its findings were manifestly against the evidence in the case.

15th. The superior court erred in that its findings were manifestly against the law.

16th. The superior court erred in that its judgment was manifestly against the evidence in the case.

17th. The superior court erred in that its judgment was manifestly against the law in the case.

Wherefore the said Leander J. McCormick prays that said judgment may be reversed, annulled, and held for nothing, and that he may be restored to all things he has lost by reason thereof.

PENCE & CARPENTER,
Att'ys for Appellant.

In the Appellate Court, First District Illinois.

LEANDER J. McCORMICK, Appellant,
vs.
THE MARKET NATIONAL BANK, Appellee. } Appeal Cook Superior.

I, Thomas G. McElligott, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 20th day of September, A. D. 1895, by said appellant.

In testimony whereof I have hereunto set my hand and
[SEAL.] seal of said court, at Chicago, this 26th day of November, A. D. 1895.

THOMAS G. McELLIGOTT,
Clerk of the Appellate Court, First District Illinois.

51 At a term of the appellate court begun and held at Chicago, on Tuesday, the first day of October, in the year of our Lord one thousand eight hundred and ninety-five, within and for the first district of the State of Illinois.

Present: Hon. Joseph E. Gary, presiding justice.
" " Henry M. Shepard, justice.
" " Arba N. Waterman, justice.
Thomas G. McElligott, clerk; James Pease, sheriff.

LEANDER J. McCORMICK
vs.
THE MARKET NATIONAL BANK OF CHICAGO, ILLINOIS. } No. 5823. Appeal Cook. Error Cook.

Be it remembered that on the 23rd day of October, A. D. 1895, it being one of the days of said October term, A. D. 1895, certain pro-

ceedings were had in said court and entered of record in words and figures following, to wit:

LEANDER J. McCORMICK
vs.
THE MARKET NATIONAL BANK. } No. 5823. Appeal from Cook Superior.

This cause having this day been reached in the call of the docket, and no one appearing to argue the same, and the court, not being fully advised in the premises, doth order that said cause be taken under advisement.

And afterwards, on the 18th day of November, A. D. 1895, the following proceedings were had and entered of record in said cause, to wit:

LEANDER J. McCORMICK, Appellant,
vs.
THE MARKET NATIONAL BANK OF CHICAGO, ILLINOIS, Appellee. } No. 5823. Appeal from Cook Superior.

52 On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards, on the 25th day of November, A. D. 1895, the following notice of motion and stipulation was filed and entered of record in said cause, to wit:

STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Appellate Court of Illinois, First District.

LEANDER J. McCORMICK, Appellant,
vs.
MARKET NATIONAL BANK OF CHICAGO, Appellee.

To Messrs. Duncan & Gilbert, attorneys for appellee:

You are hereby notified that on Monday morning, November 25th, A. D. 1895, at ten o'clock, we shall pray an appeal in the above-

entitled cause to the supreme court of Illinois, and ask to
53 have set the amount of the bond, at which time and place you may be present if you see fit.

PENCE & CARPENTER.
Attorneys for Appellant.

Received a copy of the above notice this 23rd day of November, A. D. 1895. We consent that said appeal may be allowed without bond, and that it may be taken to the central grand division.

PENCE & CARPENTER,
Attorneys for Appellants.
DUNCAN & GILBERT,
Attorneys for Appellee.

And afterwards, on the same day, to wit, the 25th day of November, A. D. 1895, the following proceedings were had and entered of record in said cause, to wit:

LEANDER J. MCCORMICK *vs.* THE MARKET NATIONAL BANK. } 5823. Appeal from Cook Superior.

This day came appellant, by his counsel, and moved the court for an appeal from the order and judgment of this court in said cause to the central grand division of the supreme court of Illinois, as per stipulation filed herein, and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the central grand division of said supreme court, on condition that said appellant doth, within twenty days from this date, execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of three hundred and fifty dollars, with surety thereto to be approved by the court; whereupon
54 counsel for appellant, now here, presented his certain appeal bond in said cause in the penal sum of three hundred and fifty dollars, with A. M. Pence as surety thereto, and the court, being fully satisfied as to the qualifications of said surety, doth order that said appeal bond be, and the same is hereby, taken, approved, and filed herein.

And afterwards, on the same day, to wit, the 25th day of November, A. D. 1895, an appeal bond was filed in said cause; which said bond is in words and figures following, to wit:

Know all men by these presents that we, Leander J. McCormick, as principal, and Abram M. Pence, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto the Market National Bank of Chicago, Illinois, of the same county and State, in the penal sum of three hundred and fifty dollars ($350.00), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 23rd day of November, A. D. 1895.

The condition of the above obligation is such that whereas, on the 16th day of November, A. D. 1895, the above-named Leander J. McCormick did recover in the circuit court of Cook county a judgment against the above-named Market National Bank of Chicago for the sum of two thousand five hundred and forty-eight and $\frac{35}{100}$ (2,548.35) dollars, together with the costs of said suit;

And whereas the above-named Leander J. McCormick did pray for and obtain an appeal from said judgment to the appellate court in and for the first district of the State of Illinois;

55 And whereas, on the 18th day of November, A. D. 1895, the said appellate court in and for said first district and of the October term thereof, A. D. 1895, did affirm said judgment of said circuit court rendered as aforesaid, and did give judgment against the said Leander J. McCormick in favor of the Market National Bank of Chicago for the amount of the costs of said appeal, from which last judgment and order of affirmance of said appellate court in and for said first district the said Leander J. McCormick has prayed for and obtained an appeal to the supreme court of said State:

Now, therefore, if the said Leander J. McCormick shall duly prosecute his said appeal with effect and, moreover, pay the amount of said judgment, interest, damages, and costs, rendered and to be rendered against him, in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

LEANDER J. McCORMICK,
By GEO. A. CARPENTER,
Attorney-in-fact. [SEAL.]
A. M. PENCE. [SEAL.]

I, Thomas G. McElligott, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings, and appeal bond and notice of motion for appeal and stipulation of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 26th day of No-
[SEAL.] vember, in the year of our Lord one thousand eight hundred and ninety-five.

THOMAS G. McELLIGOTT,
Clerk of the Appellate Court of the First District.

56 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Supreme Court of Illinois, Central Grand Division.

LEANDER J. McCORMICK, Appellant, }
vs. }
MARKET NATIONAL BANK OF CHICAGO, ILLINOIS, Appellee. }

And now comes the said Leander J. McCormick, by Pence & Carpenter, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The superior court erred in refusing to find as law that the execution of the lease in question by the Market National Bank of Chicago was incidental and necessarily preliminary to its organization and to its entering upon a banking business.

2nd. That the superior court erred in that it refused to find as a matter of law that the execution of the lease in question was a proper exercise of the powers possessed by the Market National Bank of Chicago to make contracts under paragraph 3 of section 5136 of the Revised Statutes of the United States.

3rd. The superior court erred in that it refused to hold as a matter of law that the limitation or last clause of paragraph 7 of said section 5136 of the Revised Statutes of the United States does not apply to the powers conferred by paragraphs 1 to 6 in said section, and that the Market National Bank of Chicago had the power to enter into said lease and to legally bind itself thereby.

4th. The superior court erred in that it refused to find as a matter of law that there was no want of power on the part of said Market National Bank of Chicago to execute said lease, but merely a
57 defective organization, and that said bank cannot plead such defective organization to defeat a recovery.

5th. The superior court erred in that it refused to find as a matter of law that said contract of lease had been fully executed.

6th. The superior court erred in that it refused to find as a matter of law that said Leander J. McCormick was not bound to ascertain whether or not the said Market National Bank of Chicago was properly and legally organized, and that if the said McCormick relied upon the representations and statements of the proper officers of said Market National Bank of Chicago that the said bank was properly and legally organized and empowered to make and enter into said lease, he is entitled to recover the stipulated rental named therein and the said Market National bank is estopped to deny its liability.

7th. The superior court erred in that it refused to find as a matter of law that the said Market National bank by its acts, conduct, and declarations, as shown by the agreed statement of facts in this case, is estopped from alleging that it was not fully organized as a banking corporation under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

8th. The superior court erred in that it refused to find as a matter of law that under the facts in this case as agreed upon the said McCormick is entitled to recover judgment, at the rate agreed upon in said lease, from July 22, A. D. 1893, up to May 1, A. D. 1895, and also to recover one-half of the expenses of repairing and changing the said premises, according to the stipulation, with interest upon each installment as it became due at the rate of five (5 %) per cent. per annum.

9th. The superior court erred in that it found upon the issues joined in favor of the said McCormick and assessed his damages only in the sum of $2,548.35.

58 10. The superior court erred in that it did not find upon the issues joined in favor of the said McCormick, and assessed his damages the amount of the rent agreed upon in said lease, from July 22, 1893, up to May 1, 1895, together with one-half of the expenses of repairing and changing the said premises according to said lease, with interest upon each installment as it bec-me due at the rate of five (5 %) per cent. per annum.

11th. The superior court erred in that it overruled the motion for a new trial made by said McCormick.

12th. The superior court erred in that it entered judgment upon the findings for said Leander J. McCormick in the sum of only $2,548.35.

13th. The superior court erred in that it did not enger judgment upon the findings for the plaintiff in a sum equal to the rent agreed upon in said lease from July 22, 1893, to May 1, 1895, together with one-half of the expenses of repairing and changing the said premises, with interest upon each installment as it became due at the rate of five (5 %) per cent. per annum.

14th. The superior court erred in that its findings were manifestly against the evidence in the case.

15th. The superior court erred in that its findings were manifestly against the law.

16th. The superior court erred in that its judgment was manifestly against the evidence in the case.

17th. The superior court erred in that its judgment was manifestly against the law in the case.

59 18th. The appellate court erred in that it found nothing erroneous, vicious, or defective in the record and proceedings of the superior court.

19th. The appellate court erred in that it found nothing erroneous, vicious, or defective in the rendition of the judgment of the superior court.

20th. The appellate court erred in that it affirmed in all things the judgment of the said superior court and ordered the same to stand in full force and effect, notwithstanding the said matters and things therein assigned for error, and in overruling the said assignment of errors.

21st. The appellate court erred in that it did not reverse the judgment of the said superior court on account of the said matters and things therein assigned for error.

Wherefore the said Leander J. McCormick prays that the said judgment and order of the said appellate court and said judgment of the said superior court may be reversed, annulled, and held for nothing, and that he may be restored to all things he has lost by reason thereof.

PENCE & CARPENTER,
Att'ys for Appellant.

60 And be it further remembered that afterwards, to wit, on the 10th day of January, A. D. 1896, it being one of the days of said January term, A. D. 1896, of said supreme court, certain proceedings were had in said court and entered of record in the words and figures following, to wit:

LEANDER J. McCORMICK *vs.* MARKET NATIONAL BANK. } No. 21. Appeal from Appellate Court, First District.

On this day come the said parties, by their attorneys, and this being one of the days set apart for the call of the docket under the rule or orders of the court for this term, and this cause coming now on to be heard, the appellant having entered motion to reverse the judgment and remand said cause, and for costs, and the appellee having entered motion to affirm the judgment herein and for costs and for *procedendo*, and said motions being taken under advisement for final hearing, and the clerk reporting to the court that said cause is now ready to be taken on the call of the docket, it is ordered by the court that this cause be now submitted upon the record, abstracts, briefs, and arguments filed and to be filed herein under the rules or order of the court; and it is further ordered by the court that this cause be now taken under advisement for final hearing.

And be it further remembered that afterwards, to wit, on the 11th day of June, A. D. 1896, an opinion was filed by said supreme court in words and figures following, to wit:

61 LEANDER J. McCORMICK *vs.* THE MARKET NATIONAL BANK. } Appeal from Appellate Court, First District.

Per Curiam:

This was an action at law for recovery of rent due from July 22, A. D. 1893, up to May 1, A. D. 1895, at the rate of $13,000 per annum, or $1,083.33 per month.

The facts are shown by a stipulation, in part as follows:

On January 31, 1893, certain parties made, under their hands, an organization certificate for the organization of the Market National Bank of Chicago, duly acknowledged the same before a notary public, and sent it, authenticated by the seal of said notary, to the Comptroller of Currency of the United States, who duly recorded and carefully preserved the same in his office on February 3, 1893.

A lease was made between Leander J. McCormick and the Market National Bank of Chicago of certain offices in the Major block, situated on the southeast corner of Madison and La Salle streets, in the city of Chicago, to be used and occupied by said Market National bank as a banking office, and for no other purpose, from May 1, 1893, to April 30, 1898, for $13,000 per annum, payable $1,083.33 on the last day of each and every month during said term.

Attached to said lease and made a part thereof was an agreement dated February 9, 1893, to the effect that certain improvements and changes should be made, and that both landlord and tenant should have the option, upon giving ninety days' notice in writing, to cancel the lease on May 1, 1895.

On June 22, 1893, the president and cashier of said Market National Bank of Chicago took possession of the premises leased to it
62 under said lease from said Leander J. McCormick, possession of said premises up to that time having been retained by said McCormick, with the consent and approval of the officers of said bank, for the purpose of putting them in a condition suitable for the occupation and use of said Market National bank, which said Leander J. McCormick did in the manner provided in said lease. On the 22nd day of June, A. D. 1893, the cashier of said national bank paid to Leander J. McCormick the rent accruing under said lease down to the 22nd day of July, 1893.

The Market National Bank of Chicago was never authorized by the Comptroller of the Currency to commence the business of banking and never did commence the business of banking.

Leander J. McCormick at the time of the negotiations, prior to the execution of said lease and at the time of the execution of said lease, and at the time when said officers of the Market National Bank of Chicago took possession of the demised premises, on the 22nd day of June, 1893, understood and believed that the Market National Bank of Chicago was duly and legally organized as a national bank, and that as such it was ready to do a banking business and had the power to enter into said lease and the agreements and modification connected therewith, and had no knowledge or information to the contrary until August 15, 1893, when the officers of the bank informed him that the said bank had no power to enter into said lease and offered to surrender both the demised premises and the lease. The officers of said bank at that time informed McCormick that the Market National Bank of Chicago had never been authorized by the Comptroller of the Currency to commence the business of banking. McCormick then and there refused to accept such surrender.

The officers of the Market National bank, prior to the 22nd
63 day of June, 1893, in pursuance of a resolution of the board of directors of said bank, purporting by its terms to authorize the same, agreed to share equally with said McCormick the cost of refitting the demised premises. The premises were changed in accordance with said agreement by the said McCormick at a cost of $2,475, which was paid by him and no part of which was ever repaid by the Market National Bank of Chicago.

The officers of the Market National bank during the month of June, 1893, after having taken possession of the leased premises, put therein the necessary fixtures and furniture required for carrying on a banking business, also a quantity of blank books and stationary, which fixtures, furniture, blank books, and stationary were not removed from said premises until April 30, 1895.

On September 30, 1893, A. F. Seeberger caused to be left with R. Hall McCormick, the duly authorized agent of Leander J. McCormick, the key to said banking office, but said R. Hall McCormick refused at that time to accept the same or to accept a surrender of said lease. The key, however, was thrown on the desk of said R. Hall McCormick and left there.

An agreement dated October 4, 1893, was made between the Market National Bank of Chicago, Illinois, and Leander J. McCormick providing that Leander J. McCormick should take possession of the leased premises and do his best to rent them, without prejudice to the rights of either party on said original lease, except that in case the bank was held liable on said lease the rent received should be applied to reduce such liability. Said agreement is signed by the Market National Bank, by A. F. Seeberger, president, and Leander J. McCormick.

Leander J. McCormick made every effort to rent and obtain a tenant for the premises pursuant to said agreement of October 4, 1893, but was unable to rent them or secure a tenant.

64 On August 15, 1893, A. F. Seeberger notified Leander J. McCormick of the abandonment of all further proceedings with respect to the carrying on *of* the said Market National Bank of Chicago of a banking business, and that the Market National bank would not occupy the premises mentioned in their lease, and that McCormick was at liberty at any time to take possession thereof.

From that date down to May 1, A. D. 1895, Leander J. McCormick refused to accept a surrender of said lease, and the Market National Bank of Chicago has refused to occupy the demised premises thereunder or to pay the rent accruing subsequent to July 22, 1893. Said premises therefore remained vacant and unoccupied, and on October 4, 1893, were taken possession of by said McCormick in pursuance of an agreement between the parties.

On July 15, 1893, the organizers of the Market National Bank of Chicago executed and signed a certificate revoking their articles of association and organization certificate and transmitted the same to the Comptroller of Currency, who filed the same in his office.

On January 3, 1895, Leander J. McCormick notified A. F. Seeberger as president of the Market National Bank of Chicago, in writing, that he intended to terminate said lease on May 1, 1895, in accordance with the terms thereof.

This suit was brought against the Market National Bank of Chicago as organized under the articles of association and organization certificate, dated January 31, 1893.

The portions of the United States statutes with reference to the organization of national banks which are in this case particularly material are the following:

65 SECTION 5133. "They shall enter into articles of association which shall specify in general terms the object for which the association was formed. These articles shall be signed by the persons uniting to form the association and a copy of them shall be forwarded to the Comptroller of the Currency to be filed and preserved in his office."

SECTION 5134. "The persons uniting to form such an association shall, under their hands, make an organization certificate which shall specifically state:

"1st. The name assumed by such association.

"2nd. The place where its operation of discount and deposits are to be carried on.

"3rd. The amount of capital stock.

"4th. The names and places of residence of the shareholders and the number of shares held by each of them.

"5th. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title."

SECTION 5135. "The organization certificate shall be acknowledged before a judge of some court of record or notary public, and shall be together with the acknowledgment thereon, authenticated by the seal of such clerk or notary, transmitted to the Comptroller of the Currency; who shall record and carefully preserve the same in his office."

SECTION 5136. "Upon duly making and filing articles of association and organization certificates, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power:

1st. To adopt and use a corporate seal.

2nd. To have succession.

3rd. To make contracts.

4th. To sue and to be sued, complain and defend in any court of law or equity, as fully as natural persons.

66 5th. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers, or any of them, at pleasure and appoint others to fill their places.

6th. To prescribe, by its board of directors, by-laws.

7th. To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on its business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange coin and bullion; by loaning money on personal securities, by obtaining, issuing and certifying notes, according to the provision- of this title.

But no association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking."

Section 5168 provides that the comptroller shall issue a certificate to do a banking business after at least fifty per centum of its capital stock has been paid in, and after the necessary Government bonds shall be deposited to secure the issue of its currency.

SECTION 5190. "The usual business of each banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate."

In passing upon this case we are first called upon to determine the effect of the U. S. statute reading: "But no association shall
67 transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the Currency to commence the business of banking."

We do not regard this as meaning incidental and necessarily preliminary to the commencement of a banking business.

The words under consideration are in the section with and immediately following a statement of powers incidental to the business of banking, which the corporation is authorized to exercise.

If the intention of Congress had been to merely forbid the doing of any business except such as is "incidental and necessarily preliminary" to the commencement of a banking business, it would have said so. Instead of this it prohibits the doing of any business save such "as is incidental and necessarily preliminary to" the organization.

The word "organization" is three times used in section 5136 before its use in the restrictive clause. By the terms of said section the association, "upon duly making and filing articles of association and an organization certificate," becomes not only a body corporate, but has all the powers it is ever to possess were it not for the inhibition already quoted.

That a lease of offices to be used "by said Market National bank as a banking office, and for no other purpose, from May 1, 1893, to April 30, 1898, for $13,000 per annum, payable, $1,083.33 on the 1st day of each and every month during said term," was not incidental and necessarily preliminary to the organization of said corporation is evident.

Never having been authorized by the comptroller to commence the business of banking, this corporation had at no time authority to do any business except such as was "incidental and neces-
68 sarily preliminary to its organization." The leasing of the rooms as a banking office, and which it was stipulated were to be used for no other purpose, was not necessarily preliminary to its organization." For the mere purpose of doing a banking business it had no power to rent rooms at all, for the doing of a banking business was not "necessarily preliminary to its organization."

Its acts in this regard were not a defective use of power or the work of a merely *de facto* corporation, but a transaction which this *de jure* and *de facto* corporation was specially forbidden to engage in. To make this lease it had no power.

It is quite likely that for the purpose of perfecting its organization it might have rented a room in which its members could meet

and pay in their respective subscriptions; that it could also have purchased books in which to record its proceedings, and hired a clerk to keep the record. These things might have been "necessarily preliminary to its organization;" the renting of rooms "as a banking office and for no other purpose" could not have been "necessarily preliminary to its organization."

The association is required in its organization to state the place where its operations of discount and deposit are to be carried on, but by this is meant the town or city, not the room, street, or number in such town or city. This is clear from section 5190, which provides that "the usual business of each banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate."

It will not be contended that a national bank is compelled to designate an office, street, or number, and during the entire
69 term of the existence do business at such locality.

As before stated, the attempt to make this lease was more than an abuse of power or an improper exercise of judgment. It was an attempt to do that for which no power existed. The proceeding was neither within the express or implied scope of its powers. On the contrary, power to do this thing was directly denied.

The case at bar is not like that of Tarbell *vs.* Page, 24 Ill., 46, or Bushnell *vs.* The Consolidated Ice Co., 138 Ill., 67, in which *de facto* corporations made contracts within the powers of the *de jure* body each held itself out to be; neither is this case similar to that of Chubb *vs.* Upton, 96 U. S., 95, in which one who had subscribed for stock attempted to defend, upon the ground that the stock for which he subscribed was part of an increase of capital which the company had without authority attempted to make. We are herein called upon to deal, not with irregularities, but with a plain attempt to do what was absolutely forbidden, and we are asked to enforce an executory contract made in defiance of the law the same as if it had been fully authorized.

Nor is the company, because it represented itself as fully authorized to make this lease, now estopped from insisting upon its want of power. On the contrary, it is its duty to cease to act in defiance of the law, and it has no right by silence to suffer itself to be driven into a continuance of what was always wrong.

To enforce the part of this agreement which yet remains executory would be for the court to declare that a corporation can by a contemptuous disregard of law acquire powers forbidden to it, or, as is said in Cin. Mutual Health Ass'n *vs.* Rosenthal, 55 Ill.,
70 85–87, "To give the person or corporation or individual the same rights in enforcing prohibited contracts as the good citizen who respects and conforms to the law."

It is well settled that while corporations cannot be rendered directly liable upon *ultra vires* transactions, they must account for the benefits received therefrom.

Green Brice on *Ultra Vires*, 42, 728.

Where benefits have been received under an *ultra vires* agreement, relief granted is not upon the basis that a valid or merely voidable contract has been entered into, but the act not being *malum in se*, the parties will, as near as they well can be, restored to their original condition. Penn. R. R. Co. *vs.* St. Louis, Alton, &c., R. R. Co., 118 U. S., 290; Oregon R'y & Nav. Co. *vs.* Oregonian R'y Co., 130 U. S., 1; Thomas *v.* Railroad Co., 101 U. S., 71; Chicago Bldg. Society *v.* Crowell, 65 Ill., 453–458.

We have discussed the question submitted upon the lines presented by appellant, who, the contract having been partially executed, recovered a judgment for $2,548.35. It is not here contended nor does it appear that this was not equal to the entire benefit received by appellee.

The judgment of the superior court is affirmed.

Affirmed.

Our consideration of this case has led to the same conclusion reached by the appellate court announced in the foregoing opinion by Justice Waterman. That opinion will accordingly be adopted as the opinion of this court and the judgment affirmed.

Affirmed.

CARTER, *J.*:

I do not concur in the decision rendered in this case.

71 And be it further remembered that on, to wit, *on* the elev-th day of June, in the year of our Lord one thousand eight hundred and ninety-six, an order was made by said court in words and figures following, to wit:

LEANDER J. MCCORMICK *vs.* MARKET NATIONAL BANK. } Appeal from Appellate Court, First District.

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the motions heretofore made to reverse the judgment and remand said cause for a new trial be, and the same are, denied, and the motion heretofore made to affirm the judgment herein is allowed; and it is therefore ordered by the court — the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error, and that motion for *precedendo* be allowed; and it is further considered by the court that the said appellee recover of and from the said appellant costs by it in this behalf expended, and that it have execution therefor.

72 And be it further remembered that on, to wit, the 26th day of June, A. D. 1896, a "bond" was filed in said supreme court, which is in words and figures following, to wit:

73 Know all men by these presents that we, Leander J. McCormick, as principal, and A. M. Pence, of Chicago, Illinois, as surety, are held and firmly bound unto the Market National Bank of Chicago, in said State of Illinois, in the full and just sum of two thousand (2,000) dollars, to be paid to said Market National Bank of Chicago, its successors or assigns; to which payment, well and truly to be made, we, the said Leander J. McCormick, for himself, his heirs, executors, and administrators, and the said A. M. Pence, for himself, his heirs, executors, and administrators, bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of June, in the year of our Lord one thousand eight hundred and ninety-six (1896).

Whereas lately, at a supreme court of the State of Illinois, within and for the Central grand division thereof, in a suit depending in said court between said Leander J. McCormick, as appellant therein, and the said Market National Bank of Chicago, as appellee therein, a judgment was rendered against the said Leander J. McCormick, and the said Leander J. McCormick having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and the citation directed to the said Market National Bank of Chicago, citing and admonishing it to be and appear at the Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such that if the said Leander J. McCormick shall prosecute his writ of error
74 to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

LEANDER J. McCORMICK, [SEAL.]
By M. A. TRAINER, *Att'y-in-fact.*
A. M. PENCE. [SEAL.]

Approved by—
BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of the State of Illinois.

June 23d, A. D. 1896.

75 And be it further remembered that on, to wit, the 26th day of June, A. D. 1896, a "citation" was filed in said Supreme Court, which is in words and figures following, to wit:

76 UNITED STATES OF AMERICA, *ss:*

To the Market National Bank of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on or before the 23rd day of July, in the year A. D. 1896, pursuance to a writ of error filed in the clerk's office of the supreme court of the

State of Illinois for the central grand division, wherein Leander J. McCormick is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the honorable the chief justice of the supreme court of the State of Illinois this 23rd day of June, in the year of our Lord one thousand eight hundred and ninety-six (A. D. 1896).

BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of the State of Illinois.

Service of citation acknowledged June 23rd, 1896.

DUNCAN & GILBERT,
Attorneys for the Market National Bank of Chicago.

77 And be it further remembered that on, to wit, the 26th day of June, A. D. 1896, a "petition for writ of error" was filed in said supreme court, which is in words and figures following, to wit:

78 To the Honorable Benjamin D. Magruder, chief justice of the supreme court of Illinois:

And now comes Leander J. McCormick, by Pence & Carpenter, his attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between Leander J. McCormick, appellant, and The Market National Bank of Chicago, appellee, in the supreme court of Illinois, central grand division, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against him, the said Leander J. McCormick, on the 11th day of June, A. D. 1896, in said suit, wherein was set up and claimed by said appellant:

1st. A right acquired under the national banking act, appearing in the Revised Statutes of the United States under title sixty-two (62) thereof, and the decision of said court was against the rights so set up and claimed.

2nd. Wherein was also set up and claimed by said appellant a right acquired under a contract or lease made by said appellee, The Market National Bank of Chicago, with Leander J. McCormick, the appellant, whereby said Market National bank acquired the right to the possession of a certain banking office in the city of Chicago for the period of, to wit, two (2) years, for a consideration therein expressed to be paid, and wherein said Market National bank questioned and denied its power and authority to make such contract or lease, and alleged and admitted that, although articles of association were filed with the Comptroller of the Currency, as required by section 5133 of the Revised Statutes of the United States, and

79 although an organization certificate, as provided by section 5134 of said statutes, had been filed with said comptroller and recorded by him, and although it had assumed thereby the

name of "Market National Bank of Chicago," and assumed to be a body corporate before the making of said contract or lease, yet it denied its power and authority to make such contract or lease for the reason it had not at the time of said contract or lease received a certificate from the Comptroller of the Currency authorizing it — commence a banking business, as required by section 5169 of said statutes, and the decision of said court was against the rights so set up and claimed by said appellant and was in favor of the defense so interposed by said appellee.

3rd. Wherein was also claimed by appellant a right based upon a contract made under and by virtue of section 5136 of the Revised Statutes of the United States, and the decision of said supreme court of the State of Illinois in said cause was against such right.

That a Federal question was in said cause presented for decision by said supreme court of Illinois, and that its decision was necessary for the determination of said cause, and that such Federal question was actually decided, and that the judgment as rendered could not be given without deciding it.

All of which appears in the record and proceedings in said suit, whereby manifest error happened, to the great damage of the said Leander J. McCormick. Wherefore he prays for the allowance of a writ of error and a citation and such other process as may cause the *the* same to be corrected by the Supreme Court of the United States.

PENCE & CARPENTER,
Attorneys for said Leander J. McCormick.

The writ of error herein prayed for is hereby allowed.

BENJAMIN D. MAGRUDER,
Chief Justice of the Supreme Court of the State of Illinois.

June 23rd, A. D. 1896.

80 I, E. A. Snively, clerk of the supreme court in and for the central grand division, State of Illinois, do hereby certify that the foregoing is a complete, true, and correct copy of the transcript of the record of the superior court of Cook county, Illinois, a transcript of a record of the appellate court for the first district, State of Illinois, and all the proceedings had in the supreme court of the State of Illinois, including a copy of the opinion of said supreme court, in a certain suit wherein Leander J. McCormick was appellant and Market National Bank of Chicago was appellee, and also a true and correct copy of the bond, citation, and petition for a writ of error, as the same appear of record *and* the files of my office; and I further certify that a copy of a citation and writ of error have been deposited in my said office.

Seal of the Supreme Court, State of Illinois, Aug. 28, 1818.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Springfield, this 29th day of June, A. D. 1896.

E. A. SNIVELY,
Clerk of Supreme Court.

81 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Leander J. McCormick, appellant, and Market National Bank of Chicago, appellee, a manifest error hath happened, to the great damage of the said Leander J. McCormick, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 (thirty) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

S. W. BURNHAM,
Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.

Allowed by—
——.

82 [Endorsed:] Supreme Court of the United States. Leander J. McCormick *vs.* Market National Bank of Chicago. Writ of error. Filed Jun- 26, 1896. E. A. Snively, clerk supreme court. Abram M. Pence and Geo. A. Carpenter, att'ys for pl'f in error. Copy deposited for the defendant in error in the clerk's office, U. S. circuit court, northern district of Illinois.

In obedience to the command of the within writ of error I hereby return a complete, true, and correct copy of the transcript of the record of the superior court of Cook county, Illinois, a transcript of the record of the appellate court for the first district of the State of Illinois, and all the proceedings had in the supreme court of the State of Illinois, including a copy of the opinion of said supreme court in a certain suit wherein Leander J. McCormick was appellant and Market National Bank of Chicago was appellee, and also a true and correct copy of the bond, citation, and petition for a writ of error as the same appear of record *and* the files of my office; and I further certify that a copy of the citation and writ of error have been deposited in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Springfield, this 29th day of June, A. D. 1896.

[Seal of the Supreme Court, State of Illinois, Aug. 28, 1818.]

E. A. SNIVELY,
Clerk of Supreme Court.

83 Supreme Court of the United States, October Term, A. D. 1896.

LEANDER J. MCCORMICK, Plaintiff in Error,
vs.
THE MARKET NATIONAL BANK OF CHICAGO, Defendant in Error.

And now comes the said Leander J. McCormick, by A. M. Pence, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. The supreme court of Illinois erred in holding that the execution of the lease sued upon and set out in said record was not incidental and necessarily preliminary to the organization of the said Market National Bank of Chicago, and was not preliminary to its commencing the business of banking, as provided by section 5136 of the Revised Statutes of the United States.

2nd. That said supreme court of Illinois erred in that it found as a matter of law that the execution of the lease in question was not a proper exercise of the powers possessed by the Market National Bank of Chicago to make contracts, as provided in section 5136 of the Revised Statutes of the United States.

3rd. The said supreme court of Illinois erred in that it held as a matter of law that the limitation or last clause of paragraph 7 of said section 5136 of the Revised Statutes of the United States applies to the powers conferred by paragraphs one to six in said section, and that said Market National Bank of Chicago had not the power

84 to enter into said lease and to legally bind itself thereby.

4th. The supreme court of Illinois erred in holding that said Market National bank had no power to execute said lease on account of its defective and uncompleted organization, and because the Comptroller of the Currency had not issued a certificate authorizing said Market National bank to commence the business of banking, and it also erred in holding that said Market National bank could plead such defective and uncompleted organization for the purpose of defeating a recovery for the breach of said lease.

5th. The supreme court of Illinois erred in finding as a matter of law that said plaintiff in error was chargeable with notice of the uncompleted and defective organization of said Market National bank of Chicago at the time of the execution of said lease.

6th. The supreme court of Illinois erred in holding that said Market National bank was not estopped to deny its liability and from alleging that it was not fully organized as a banking corpora-

tion under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

7th. The supreme court erred in not finding that the plaintiff in error was entitled to recover for the rent agreed upon in said lease from July 22nd, 1893, to May 1st, 1895, together with one-half of the expenses of repairing and altering said premises, with interest upon each installment as it became due, at the rate of five per cent. (5%) per annum.

8th. The supreme court erred in that its findings were manifestly against the law and the evidence in the case.

Wherefore the said Leander J. McCormick prays that the
85 said judgment of the said supreme court of Illinois, and also said judgment of the said appellate court of Illinois, and of said superior court of Cook county, Illinois, may be reversed, annulled, and held for nothing, and that he may be restored to all things that he has lost by reason thereof.

And he will ever pray, etc.

A. M. PENCE,
Att'y for Pl't'ff in Error.

[Endorsed:] Supreme Court of U. S. Leander J. McCormick, plaintiff in error, *vs.* Market National Bank of Chicago, defendant in error. Transcript of record.

Endorsed on cover: Case No. 16,333. Illinois supreme court. Term No., 554. Leander J. McCormick, plaintiff in error, *vs.* The Market National Bank of Chicago. Filed July 13, 1896.

165-538 554

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1896.

Leander J. McCormick,
Plaintiff in Error,
vs.
The Market National Bank of Chicago,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

A. M. PENCE,
Counsel for Plaintiff in Error.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

tion under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

7th. The supreme court erred in not finding that the plaintiff in error was entitled to recover for the rent agreed upon in said lease from July 22nd, 1893, to May 1st, 1895, together with one-half of the expenses of repairing and altering said premises, with interest upon each installment as it became due, at the rate of five per cent. (5%) per annum.

8th. The supreme court erred in that its findings were manifestly against the law and the evidence in the case.

Wherefore the said Leander J. McCormick prays that the
85 said judgment of the said supreme court of Illinois, and also said judgment of the said appellate court of Illinois, and of said superior court of Cook county, Illinois, may be reversed, annulled, and held for nothing, and that he may be restored to all things that he has lost by reason thereof.

And he will ever pray, etc.

A. M. PENCE,
Att'y for Pl'ff in Error.

[Endorsed:] Supreme Court of U. S. Leander J. McCormick, plaintiff in error, *vs.* Market National Bank of Chicago, defendant in error. Transcript of record.

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165-538

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554

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

Leander J. McCormick,
Plaintiff in Error,
vs.
The Market National Bank of Chicago,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

A. M. PENCE,
COUNSEL FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1896.

Leander J. McCormick,
Plaintiff in Error,
vs.
The Market National Bank of Chicago,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

STATEMENT.

MAY IT PLEASE THE COURT:

This is an action at law for the recovery of rent due from July 22, A. D. 1893, up to May 1, A. D. 1895, at the rate of $13,000 per annum, or $1,083.33 per month.

On February 8, 1893, McCormick executed and delivered to the Market National Bank of Chicago a lease of a certain banking office on the south-east corner of Madison and La Salle streets, Chicago, for a period of five years, with a proviso therein that either party might cancel said lease on May 1, 1895, by giving prior notice, and it was

formally terminated by the election of Mr. McCormick upon the latter day.

McCormick brings suit for the rent thereof from July 22, 1893, up to May 1, 1895, no rent whatever having been paid during that period of time, although one month's rent was paid by the said bank upon its entering into said banking office on June 22, 1893.

The defense is that the bank, after executing the lease, concluded to liquidate before it ever deposited it's bonds with the comptroller of the currency, and before it received a final certificate from the comptroller authorizing it to do a banking business, and, having so concluded to liquidate, it attempted to cancel the lease and they now claim that the lease is invalid, because they claim at the time the bank signed the same it had not completed its organization, so far as to enable it to issue its currency and do a general banking business, and that the execution of such lease was not incidental and necessarily preliminary to the organization of the bank.

The court below heard the case without a jury, by agreement of parties, and found that the contract was invalid from the date when the bank so elected to declare it invalid, on August 15, 1893, and disallowed any rent under said lease from August 15, 1893, up to May 1, 1895, and entered judgment for $2,448.35, being for rent due up to August 15, 1893, and for one half of certain repairs made—fitting the office for occupation. This judgment was affirmed by the Supreme Court of the state. The whole contest, therefore, is simply upon the validity of the lease, as against such corporation, executed by the parties on February 9, 1893. The court will remember that a panic commenced early in 1893, and the subscribers for the stock of the bank concluded it wise to withdraw

from the enterprise, after having paid in a large portion of the capital stock, over $300,000, and after having rented such banking office and having prepared to do a general banking business.

The facts of the case were all agreed to, and are embodied in a stipulation. (Rec., 8.)

The law authorizing the organization of national banks will be found in the Revised Statutes of the United States edition of 1878, commencing with section 5133. The portions of the United States Statutes with reference to the organization of national banks which are to be particularly considered are the following:

Section 5133. "They shall enter into *articles of association* which shall specify in general terms the object for which the association is formed. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the comptroller of the currency to be filed and preserved in his office."

Section 5134. "The persons uniting to form such an association shall, under their hands, make *an organization certificate* which shall specifically state:

"1st. The name assumed by such association.

"2d. The place where its operations of discount and deposits are to be carried on.

"3d. The amount of capital stock.

"4th. The names and places of residence of the shareholders and the number of shares held by each of them.

"5th. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title."

Section 5135. "The organization certificate shall be acknowledged before a judge of some court of record

"or notary public, and shall be, together with the ac-
"knowledgment thereof, authenticated by the seal of
"such clerk or notary transmitted to the comptroller of
"the currency, who shall record and carefully preserve
"the same in his office."

Section 5136. "Upon duly making and filing *articles* "*of association and an organization certificate*, the associa-
"tion shall become, as from the date of the execution of
"its organization certificate, a body corporate, and as
"such, and in the name designated in the organization
"certificate, it shall have power:

"1st. To adopt and use a corporate seal.

"2d. To have succession.

"3rd. To make contracts.

"4th. To sue and to be sued, complain and defend in
"any court of law or equity, as fully as natural per-
"sons."

"5th. To elect or appoint directors, and by its board
"of directors to appoint a president, vice-president,
"cashier and other officers, define their duties, require
"bonds of them and fix the penalty thereof, dismiss such
"officers, or any of them, at pleasure, and appoint others
"to fill their places.

"6th. To prescribe, by its board of directors, by-
"laws. * * *

"7th. To exercise by its board of directors, or duly
"authorized officers or agents, subject to law, all such
"*incidental powers as shall be necessary to carry on its*
"*business* of banking; by discounting and negotiating
"promissory notes, drafts, bills of of exchange and other
"evidences of debt; by receiving deposits; by buying
"and selling exchange coin and bullion; by loaning
"money on personal securities; by obtaining, issuing

"and certifying notes, according to the provision of this "title."

"But no association shall transact any business, except "such as is incidental and necessarily preliminary to its "organization, until it has been authorized by the comp- "troller of the currency to commence the business of "banking."

Section 5,168 provides that the comptroller shall issue a certificate to do a banking business after at least fifty per centum of its capital stock has been paid in and after the necessary government bonds shall be deposited to secure the issue of its currency.

Section 5,190. "The usual business of each banking "association shall be transacted at an office or banking "house located in the place specified in its organization "certificate."

The court will best understand all the facts of the case by reading the stipulation referred to, but we will here set out some of the leading facts necessary for our argument.

On January 31, 1893, Anthony F. Seeberger and others entered into *articles of association* for the purpose of forming a national bank, and filed them with the comptroller on February 3, 1893 (see Rev. Stat., Sec. 5,133), and on that day the same parties made, under their hands, *an organization certificate* referred to in the statute (see Sec. 5,134), and sent the same to the comptroller of the currency, who duly recorded and preserved the same. The directors and officers of the bank were elected on the same day.

On February 9, 1893, the president of the bank, Mr. Seeberger, in the name of the Market National Bank of Chicago, and as president thereof, in pursuance of a res-

olution of the board of said bank, purporting by its terms to authorize him so to do (Rec., 16), entered into a lease, in writing, with the plaintiff, of the premises in question to be used as a banking room and place of business by said Market National Bank. In pursuance of such resolution the lease was made between the plaintiff and said Market National Bank of the offices in question, situated in the Major Block, south-east corner of Madison and La Salle streets, in Chicago, to be used and occupied by said Market National Bank as a banking office, and for no other purpose, from May 1, 1893, for the period of five years at $13,000 per year, payable $1,083.33 monthly. The lease was not only signed by Mr. McCormick, but also by the Market National Bank, by A. F. Seeberger, president, with the corporate seal of the Market National Bank attached and attested by William Cox, cashier. It was provided that either party might cancel the lease on May 1, 1895, after giving ninety days' previous notice. Some or the shareholders of the bank never paid any part of their subscriptions, others paid a portion, and of the entire capital stock of $1,000,000, the sum of $331,545 was paid in.

On June 22, 1893, the president and cashier of the bank took possession of said premises (the possession being retained until that time by agreement for the purpose of putting the banking office in a suitable condition), and, on that day the bank paid to plaintiff a month's rent, ending on the 22d day of July, 1893.

The Market National Bank was never authorized by the comptroller to commence the business of banking, and never did so commence except in the preparation so made therefor. The plaintiff, at the time of the negotiations, prior to the time of the execution of said lease and at the

time of its execution and at the time when said officers of said bank took possession of the demised premises on June 22, 1893, understood and believed that the Market National Bank was duly and legally organized as a national bank, *and that as such it was ready to do a banking business, and had the power to enter into said lease, and had no knowledge or information to the contrary until August 15, 1893,* when the officers of said bank informed him that the bank had no power to enter into said lease, and offered to surrender both the demised premises and the lease, and then informed the plaintiff that said bank had never been authorized by the comptroller to commence the business of banking and refused further to perform or pay rent. The plaintiff refused to accept such surrender. Prior to the execution of the lease the officers of the bank were elected by its board of directors and the seal was made. The lease was authorized by the directors. The name of the bank was signed to said lease by its president, and its corporate seal attached thereto by its cashier (Rec., 27, 28.) The officers of the bank, from time to time, corresponded with the plaintiff, signing themselves in their official capacity, and used in such correspondence letterheads with the name of the Market National Bank, its location and place of business, and the name of its officers printed thereon. By the declaration, acts and conduct of the officers of this bank, the plaintiff was induced to believe, and did believe, that it was fully organized and competent to make this lease. The officers of the bank, during the month of June, 1893, put in such office the necessary fixtures and furniture required for carrying on a banking business; also blank books and stationary, *which fixtures, furniture, blank books and stationary were not removed from said premises until April*

30, 1895. On October 4, 1893, plaintiff and the bank agreed that the plaintiff should do his best to rent the premises without prejudice to the rights of either party, except that in case the bank was held liable on said lease, the rent received should be applied to reduce such liability. Said agreement was signed by the Market National Bank, by A. F. Seeberger, its president, and by the plaintiff.

Plaintiff used every effort to rent and obtain a tenant for the premises, pursuant to the above agreement, but was unable to rent the same or secure a tenant prior to May 1, 1895.

On August 15, 1893, Seeberger notified the plaintiff of the abandonment of all further proceedings with respect to carrying on a banking business by said corporation, and that the said bank would not occupy the said premises mentioned in the lease, and offered to surrender such lease and refused further to perform the same, and further notified the plaintiff that he, the said McCormick, was at liberty at any time to take possession thereof. McCormick refused to accept the surrender of the lease and the bank refused to occupy the premises thereunder for banking purposes and refused to pay the rent accruing subsequent to July 22, 1893.

On July 15, 1893, the organizers of the bank executed and signed a certificate revoking their articles of association and organization certificate and transmitted the same to the comptroller of the currency.

It was stipulated in writing between the parties that both matters of law and fact might be tried by the court without a jury, a jury being waived, and that the respective parties might establish any cause of action or defense

under the pleadings filed which they might establish under any form of pleadings.

Section 41, chapter 110 of the revised statutes of Illinois, entitled Practice act, reads as follows: "In all "cases in any court of record in this state, if both parties "shall agree, both matters of law and of fact may be "tried by the court, and upon such trial either party may, "within such time as the court may require, submit to "the court written propositions, to be held as law in the "decision of the case, upon which the court shall write, "*refused*, or *held*, as he shall be of opinion is the law, or "modify the same, to which each party may except, as "to other opinions of the court."

The Supreme court of the state may review the errors, if any committed by the trial court in holding or refusing the propositions presented, and reverse or affirm the case for the errors of the court below in holding or refusing such propositions.

1st Nat. Bank v. *Haskell*, 124 Ill., 587.
Myers v. *Union Nat. Bank*, 128 Ill., 478.

The propositions of law submitted to the trial court were as follows (Rec., 42):

"1st. That the execution of the lease in question by the defendant was incidental and necessarily preliminary to its organizntion and to its entering upon a banking business.

2d. That the execution of the lease in question was a proper exercise of the powers possessed by such defendant to make contracts under paragraph 3 of section 5136 of the Revised Statutes of the United States.

3d. That the limitation or last clause of paragraph 7 of said section does not apply to the powers conferred by paragraphs 1 to 6 in said section; that the Market National Bank of Chicago had the power to enter into said lease and to legally bind itself thereby.

4th. That there was no want of power on the part of said defendant to execute said lease, but merely a defective organization, and said bank cannot plead such defective organization to defeat a recovery.

5th. That said contract of lease has been fully executed.

6th. That the said plaintiff was not bound to ascertain whether or not the said defendant was properly and legally organized, and that if the plaintiff relied upon the representations and statements of the proper officers of said defendant, that the bank was properly and legally organized and empowered to make and enter into said lease, he is entitled to recover the stipulated rental named therein and the defendant is estopped to deny its liability.

7th. That the said defendant, by its acts, conduct and declaration, as shown by the agreed statement of facts in this case, is estopped from alleging that it was not fully organized as a banking corporation under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

8th. That the plaintiff, under the facts in this case as agreed upon, is entitled to recover judgment at the rate agreed upon in said lease from July 22d, A. D. 1893, up to May 1st, A. D. 1895, and also to recover one-half of the expenses of repairing and changing the said premises, according to the stipulation, with interest upon each installment as it became due, at the rate of five (5%) per cent per annum.

The trial court refused to hold the propositions aforesaid as law and the plaintiff excepted.

The case was appealed to the Appellate Court of Illinois and the judgment of the trial court affirmed. (See opinion, 61 Ill. Appellate Court, 33.)

The case was then appealed to the Supreme Court of Illinois, and the judgment of the Appellate Court was affirmed. (See 162 Illinois, 100; also Rec., 61.)

The Supreme Court of Illinois adopted the opinion of

the Appellate Court as its own. Errors were duly assigned by the plaintiff in the Appellate and Supreme Courts upon the propositions of law submitted to the trial court by the plaintiffs and which were refused by the trial court.

It is plain that a Federal question is involved, and hence no discussion will be indulged upon that proposition.

THE ASSIGNMENT OF ERRORS UPON THE TRANSCRIPT OF THE RECORD IN THIS COURT IS AS FOLLOWS:

1. The Supreme Court of Illinois erred in holding that the execution of the lease sued upon and set out in said record was not incidental and necessarily preliminary to the organization of the said Market National Bank of Chicago, and was not preliminary to its commencing the business of banking, as provided by section 5136 of the Revised Statutes of the United States.

2. That said Supreme Court of Illinois erred in that it found as a matter of law that the execution of the lease in question was not a proper exercise of the powers possessed by the Market National Bank of Chicago, to make contracts, as provided in section 5136 of the Revised Statutes of the United States.

3. The said Supreme Court of Illinois erred in that it held as a matter of law that the limitation, or last clause of paragraph 7 of said section 5136 of the Revised Statutes of the United States applies to the powers conferred by paragraphs 1 to 6 in said section, and that said Market National Bank of Chicago had not the power to enter into said lease and to legally bind itself thereby.

4. The Supreme Court of Illinois erred in holding

that said Market National Bank of Chicago had no power to execute said lease on account of its defective and uncompleted organization, and because the comptroller of the currency had not issued a certificate authorizing said Market National Bank to commence the business of banking, and it also erred in holding that said Market National Bank could plead such defective and uncompleted organization for the purpose of defeating a recovery for the breach of said lease.

5. The Supreme Court of Illinois erred in finding as a matter of law that said plaintiff in error was chargeable with notice of the uncompleted and defective organization of said Market National Bank of Chicago, at the time of the execution of said lease.

6. The Supreme Court of Illinois erred in holding that said Market National Bank was not estopped to deny its liability and from alleging that it was not fully organized as a banking corporation under the laws of the United States, and from alleging that it did not have the power to execute the lease in question.

7. The Supreme Court of Illinois erred in not finding that the plaintiff in error was entitled to recover for the rent agreed upon in said lease from July 22, 1893, to May 1, 1895, together with one-half of the expenses of repairing and altering said premises, with interest on each installment as it became due at the rate of five per cent. per annum.

8. The Supreme Court of Illinois erred in that its findings were manifestly against the law and the evidence in the case.

I.

THIS CORPORATION HAD THE NAKED POWER TO DO A BANKING BUSINESS AND THINGS INCIDENTAL THERETO AT THE TIME IT EXECUTED THIS LEASE, NOTWITHSTANDING THE INHIBITION AGAINST THE COMMENCEMENT OF SUCH BANKING BUSINESS UNTIL A FUTURE DAY, OR UPON THE HAPPENING OF A FUTURE EVENT. IT HAD THE POWER TO MAKE THIS LEASE, AND THE ABUSE THEREOF SIMPLY SUBJECTED IT TO PUNISHMENT BY DEPRIVING IT OF ITS CHARTER AT THE HANDS OF THE GOVERNMENT, BUT DID NOT RENDER ITS CONTRACT VOID. COURTS WILL IN NO CASE DECLARE A TRANSACTION VOID ON ACCOUNT OF A GENERAL PROHIBITION OR INHIBITION OF THIS DESCRIPTION AS AGAINST A PERSON WHO ACTED IN GOOD FAITH AND WITHOUT NOTICE OF THE INFRINGEMENT OF THE LAW.

The *articles of association*, as provided in section 5133 of the Revised Statutes of the United States, having been filed with the comptroller of the currency, and *a certificate of organization* having been filed as provided by section 5134 of the Revised Statutes, the defendant thereby *became a body corporate* from the date of the execution of the organization certificate, as is provided in section 5136 of the Revised Statutes, *and as such possessed all the powers of a banking corporation*, except the power to issue currency. Having all powers to do an ordinary banking business, it necessarily possessed all powers, as might be necessary to enable it to attain the object for which it was created, and, among such incidental powers was the right to rent a banking office and to execute a lease therefor.

The language of section 5136 of the Revised Statutes is as follows:

"Upon duly making and filing *articles of association and* "*an organization certificate, the association shall become,* "AS FROM THE DATE OF ITS ORGANIZATION CERTIFICATE, *a* "*body corporate,* and as such and in the name designated "in the organization certificate, it shall have power:

"*First.* To adopt and use a corporate seal.

"*Second.* To have succession.

"*Third. To make contracts.*

"*Fourth.* To sue and be sued, complain and defend "in any court of equity, as fully as natural persons.

"*Fifth.* To elect or appoint directors, and by its "board of directors to appoint a president, vice-president, "cashier and other officers, define their duties, require "bonds from them, and fix the penalty thereof; dismiss "such officers or any of them at pleasure and appoint "others to fill their places.

"*Sixth.* To prescribe, by its board of directors, by-"laws. * * *

"*Seventh.* To exercise by its board of directors *or* "*duly authorized officers or agents, subject to law, all such* "*incidental powers* as shall be necessary to carry on its "business of banking, by discounting and negotiating "promissory notes, drafts, bills of exchange and other "evidence of debts; by receiving deposits; by buying and "selling exchange, coin and bullion; loaning money on "personal securities; by obtaining, issuing and and cer-"tifying notes, according to the provisions of this stat-"ute.

"*But no association shall transact any business except* "*such as is incidental and necessarily preliminary to its* "*organization until it has been authorized by the comp-*

"*troller of the currency to commence the business of bank-*
"*ing.*"

It will be observed from the foregoing that this corporation, at the time of the execution of this lease, possessed all corporate functions of a bank except the issuing of currency. The language so expressly states. It says such bank, *upon the filing of its certificate of organization* (as was done in this case), possesses the power to make contracts. It also possesses the power, under the seventh paragraph of this section, to do a complete banking business, *and to exercise all incidental powers necessary thereto.*

Although the power is fully conferred upon this corporation to do a banking business and to exercise all incidental powers, yet an inhibition is laid upon the bank from transacting strictly a banking business until it has been authorized by the comptroller of the currency, upon the collection of its capital and the deposit of its bonds with the comptroller, to commence the business of banking. Although it has the power to do a banking business, there is an inhibition upon it as to the time when it shall commence to exercise such power.

This inhibition does not take away the power formerly granted by the act under the prior paragraphs. It does not make the exercise of such a power null and void or penal, but it is simply a disobedience to the mandates of the law which would entitle the government to deprive it of its franchise for such disobedience.

See,

National Bank v. Mathews, 98 U. S., 621.
Whitney v. *Wyman*, 101 U. S., 392.
2 Morawetz Corp., Secs. 660, 665.
Harrod v. *Hamer*, 32 Wis., 162.
Hammond v. *Straus*, 53 Md., 1.

Mr. Morawetz, in his work on Corporations, vol. 2, sec. 660 (second ed.), says:

"And it may be assumed that the courts would in no "case declare a transaction void on account of a general "prohibtion of this description as against a person who "acted in good faith and without notice of the infringe- "ment of the law."

And again, section 665. with reference to inhibitions prohibiting the acts of foreign corporations without complying with certain prerequisites, says:

"It is clearly not the primary purpose of the legisla- "ture in passing these statutes to render the contracts "and dealings, of corporations, which have not complied "with the statutes, void and unenforcible; hence, where "the legislature has not expressly declared that this re- "sult shall follow from a failure to comply with the stat- "ute, the courts ought not to imply such a result unless "this be necessary in order to attain the primary object "for which the statute was passed. For these or similar "reasons some of the courts have held that a contract "made by a foreign corporation before it has complied "with the statutory prerequisites to the right to do busi- "ness, will not, on that account, be held absolutely void, "unless the statute declares that it shall be void."

And again he says, Sec. 666: "The intention of the "legislature must always be sought after in deciding upon "the legal effect of words contained in a law or charter, "and unless it appear affirmatively that the legislature in- "tended to render a forbidden act or contract absolutely "void in legal contemplation, it will not be so held."

The principle above announced is extracted from the cases decided by this court and above referred to.

In the case of the *National Bank* v. *Mathews*, 98 U. S., 621, A executed a promissory note to B, and to secure the payment thereof, executed a deed of trust of lands which was in effect, a mortgage with a power of sale thereto annexed. A national bank, on security of the note and trust deed, loaned money to B who thereupon assigned them to the bank. The note not having been paid at maturity, the trustee was, pursuant to the power, proceeding to sell the land when A filed his bill to enjoin the sale upon the ground that by sections 5136 and 5137 of the Revised Statutes the security was void. The court referred to section 5136 heretofore quoted, whereby a banking association is authorized to loan money *on personal security*, and also referred to section 5137, which provides that a national banking association may purchase, hold and convey real estate for the the following purposes, *and for no other:*

"1st. * * *

"2d. Such as shall be mortgaged to it in good faith "by way of security for debts previously contracted."

It was contended that any contract by the bank to loan money upon real estate security was null and void. This court, in its decision, said (page 627):

"The statute does not declare such a security void; it "is silent upon the subject. If Congress so meant, it "would have been easy to say so, and it is hardly to be "believed that this would not have been done instead of "leaving the question to be settled by the uncertain re-"sults of litigation and judicial decision." The court then refers to various cases where such an inhibition was held not to render the contract void, but simply to subject the bank to a forfeiture of its charter upon the interposition of the state. The court then proceeds:

"Where a corporation is incompetent, by its charter, "to take a title to real estate, a conveyance to it is not "void, but only voidable and the sovereign alone can ob- "ject. It is valid until assailed in a direct proceeding "instituted for that purpose." And, in quoting from a decision of Chancellor Kent on page 628, this court says: "Chancellor Kent says: 'Perhaps it would be sufficient "for this case that the plaintiffs are a duly incorporated "body, with authority to contract and take mortgages "and judgments, and if they should pass the exact line "of their power it would rather belong to the govern- "ment of Pennsylvania to execute a forfeiture of their "charter, than for this court in this collateral way to "decide a question of misuser by setting aside a just and "*bona fide* contract. * * *"

This court then said: "We cannot believe it was "meant that the stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded by giving success to this defense whenever the "offensive fact shall occur. *The impending danger of a "judgment of ouster and dissolution was, we think, the "check, and none other contemplated by Congress.*

"That has always been the punishment prescribed for "the wanton violation of a charter, and it may be made "to follow, whenever the proper public authority shal "see fit to invoke its application. A private person can- "not, directly or indirectly, usurp this function of the "government."

In the case of *Whitney* v. *Wyman*, 101 U. S., 392, this court refers to, and affirms, among other cases, that of *National Bank* v. *Mathews*. That is the case where there is an inhibition upon a corporation from doing business until certain provisions of the statute had been complied

with. The business in question was done before the corporation had complied with those provisions of the statute. The statute of Michigan provided that they (the articles of association) shall be so filed before the corporation shall commence business, which was done in that case. The person with whom the contract was made sued the directors of the corporation, claiming that no corporation existed, and consequently that the directors were liable as partners. The defense set up was that the corporation had the power to do the business in question, notwithstanding the fact that they had not filed their articles of association with the recorder before the business was transacted. This court says:

"But it is said the corporation at the date of these letters *was forbidden to do any business*, not having then filed its articles of association, as required by the statute. The corporation having assumed, by entering into contract with the plaintiff, to have the requisite power, *both parties are estopped to deny it.*

"*The restriction imposed by the statute is a simple inhibition.* It did not declare that what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity." (Citing *National Bank* v. *Mathews*, 98 U. S., 621.

In the two cases above referred to this court, in discussing the question, placed its decision upon the broad ground that it was not a void contract, the defense being that the association was not fully organized or authorized and was inhibited from making the contract. It will be observed that the language of the statute in the last case is similar in its terms to the inhibition used in this statute.

The language there used was, that "they (the articles of as-"sociation) shall be so filed *before the corporation shall* "*commence business.*" The language here is: "No associa-"tion shall transact any business except as such incidental "and necessarily preliminary to its organization, until it "has been authorized by the comptroller of the currency "*to commence the business of banking.*" In neither case is there a penalty imposed, nor is any such contract declared to be null and void.

In the case at bar the statute itself provides that (section 5136): "Upon duly making and filing articles of "association and an organization certificate, *the associa-*"*tion shall become as from the date of the execution of* "*its certificate, a body corporate,* and as such, and in the "name designated in the organization certificate, it shall "have power:

* * * * *

"3d. To make contracts.

"7th. To exercise, by its board of directors or duly "authorized officers or agents, subject to law, all such "incidental powers as shall be necessary to carry on its "business of banking." (Enumerating the various other things which may be done as a banking institution).

Now, it seems clear, and is not the subject of a doubt, that the power was placed in this association, as a fully organized body corporate, to do a banking business, and everything incidental thereto. But an inhibition was simply placed upon the body corporate that it should not commence to do a banking business until the comptroller should receive the deposit of bonds, deliver the currency and issue a final certificate. If the power existed, then the improper exercise or abuse of such power was simply a subject over which the government has control, and in

no manner interferes with the right of parties contracting with it. Such is the purport of the decisions of this court, and such is of common sense. And I find that other courts have also so decided.

In the case of *Harrod* v. *Hame*, the act under which the corporation was organized provided that "before any "corporation organized thereunder *shall commence busi-* "*ness*, the president and directors shall cause the articles "of association to be published in the papers, make a "certificate of the purposes for which the corporation is "formed, the amount of capital stock, the amount actu- "ally paid in, the names of the stockholders, the number "of shares by each respectively owned and deposit the "same with the secretary of state and a duplicate with the "clerk of the town, city or village where the business is "to be carried on."

The corporation, however, without complying with the requirements above set out, but after it had performed all the other preliminaries in becoming incorporated, proceeded to do business, and the question arose as to whether it was a legally organized corporation, and hence bound as a corporation. The Supreme Court of Wisconsin, by DIXON, Chief Justice, says: "The theory upon "which this action is prosecuted is that the sub- "scribers to the articles of association and agreement "did not, by the steps and proceedings taken, become "or constitute a body politic and corporate under the "name assumed by them in their articles; but that "they failed altogether in organizing and establising a "corporation under the provisions of the statute, as they "attempted and intended to do. The supposition is that "no corporation was created, and hence that the sub- "scribers, shareholders or owners of the supposed capital

"stock became a sort of unincorporated, joint stock "company, or *quasi* firm or partnership, and so liable in "their individual capacity, either jointly, severally or "directly to the creditors of the company or association. "We are of opinion that this view of the transaction is "entirely erroneous, and that the corporation was organ- "ized and set in motion, with which creditors and others "must deal as a corporation, and against which and "against the stockholders in which claims and demands "must be enforced as in case of other like corporate "bodies.

"It is not objected or shown that any requirement of "the statute was omitted or not complied with, except "only that the certificate prescribed was not made and "deposited with the secretary of state and the duplicate "with the town clerk, as therein directed. The only "question, therefore, is, whether this failure of the pres- "ident and directors to make and deposit the certificate "and duplicate operated to defeat the organization or to "annul the proceedings by which the corporation had "been brought into existence. The very words of the "section are a sufficient answer: 'Before *any corpora-* "*tion*, formed and established by virtue of the provisions "of this law, *shall commence business*, the president and "directors thereof shall cause their articles of association "to be published, etc., and shall make a certificate, etc.' "It will not be easy by any words to recognize the ex- "istence of the corporation without the publication and "without the certificate, or before they have been made "more clearly than has been done here. The corporate "existence is clearly acknowledged, and intended so to be "and the prohibition is only against its *commencing a busi-* "*ness* until the requirements of the section are complied

" with. It is spoken of as a corporation formed and estab-
" lished by virtue of the provisions of the law and having
" officers such as the law prescribed, namely, a president
" and board of directors capable of acting for the corpora-
" tion, and upon which, in their official capacities, certain
" duties are therein specifically imposed and their perform-
" ance commanded. * * * It is regarded as a corpo-
" ration fully capable of contracting debts and having
" officers to whom the performance of certain duties has
" been and still may be lawfully required."

The court held that the corporation was bound by its acts, notwithstanding it was provided that it should not commence to do business until it had complied with the provisions above set out. If we measure this case by that one, we find that all of our contentions strictly fall within the decision in that case. In this case the statute expressly provides that the acts which they actually had done and performed already constitute these gentlemen a body corporate. And then the qualifying clause to paragraph 7 of the same section refers to this association so organized as an existing corporation. And, moreover, the very act itself enumerates the things that may be done; namely, that it may make contracts. In this case, as in that, no words could be used more fully indicating that this corporation was duly organized as a corporation, and the only limitation placed upon said corporation prior to the certificate of the comptroller was that it should not conduct a banking business until that certificate was obtained. The penalty of conducting a banking business or anything that would fall under the same, or be incidental thereto, was something to be enforced by the government itself such as forfeiting its charter; but in no manner interfered with its corporate powers as be-

tween it and other individuals. It was not limited in power, but it was simply limited as to its duty, and disregarding its duty, the government would call it to account, but it could not disregard its contracts once made, having been fully organized as a corporate body without the certificate of the comptroller. This corporation was regarded as fully capable of contracting debts and of having officers, of whom the performance of certain duties has been and may still be lawfully required.

That was the language used in the Wisconsin case. The election of officers was fully authorized and was performed; power being conferred by the third paragraph of the section in question to contract debts, it was capable of contracting debts, but it was its duty not to contract debts as between it and the government until certain other requisites had been complied with. Its capacity to contract debts came into existence with the corporation itself, and you cannot think of an entity except in connection with its capacities, and when this association of gentlemen became a legal entity and corporate body, it became possessed of capacities; that is, such capacities as are conferred by the general banking act, and only its performance of it was restricted, and if it performed them wrongfully and against its duty, it was for the government to punish for the same.

And this is the law laid down also in *Hammond* v. *Straus*, 53 Md., 1. In that case there was a reorganization of an old corporation under a new statute, which new statute previded that "when twenty-five per cent. of "the minimum capital stock shall have been paid in, etc., "and so certified by a majority of the corporation, to the "treasurer and comptroller of the state, and a certificate of "their organization transmitted to the clerk of the Court

"of Appeals to be by him recorded among the records of "his office, and *not before*, shall they be entitled to all "the benefits and privileges herein conveyed or in- "tended to be conveyed." The things required by that provision were not complied with. The court says, page 14:

"As will be observed, there is nothing in this language "which purports a condition precedent to the existence "of a corporation. The acts required to be done could "only have been done by the incorporators after the "act of incorporation had been accepted, the requisite "amount of the capital stock subscribed, and the organ- "ization under the act completed. Not until then could "the certificates have been furnished, as required by the "act, and, as we have seen, upon the acceptance of the "act, the parties named became incorporated by force of "the act itself. The certificates were required as the "evidence of what had been done, *and the statute simply* "*prohibited the exercise of the rights and privileges* "*granted;* that is to say, the active operations of the "corporation, until the certificates were furnished. The "neglect or omission to observe the requirements of the "law in this respect *might have afforded the state a right* "*to proceed against the corporation*, to deprive it of its "franchises, but such neglect or omission can never be "set up, either by the corporation itself or its stock- "holders, as a defense to an action to enforce their liabil- "ities. It has been held in numerous cases that any "actions against the corporation or a stockholder thereof, "as such, *it is not incumbent upon the plaintiff to prove* "that the incorporators have complied with all the re- "quirements of the act of incorporation, unless the acts "required are *conditions precedent to the corporate ex-*

"*istence;* and that same principle precludes the defend-
"ant from defeating the action by showing the non-
"compliance of the requirements of the statute. By
"holding otherwise, parties might avail themselves of
"the powers and privileges of a corporation without
"in any manner subjecting themselves to its duties and
"obligations, and might set up their own neglect of
"duty or willful omission to comply with the require-
"ments of the statutes as a means of discharge of all
"their just obligations under the law. This is forbid-
"den by every principle of law and justice, and hence
"such a defense could never be tolerated. *Frost* v.
"*Frostburg Coal Co.*, 24 How., 274; *Chubb* v. *Upton*,
"95 U. S., 661, 667; *Narragansett Bank* v. *Atlantic*
"*Silk Co.*, 3 Metc., 283; *Merrick* v. *Reynolds Engine*
"*Co.*, 101 Mass., 381; *Tarbell* v. *Page*, 24 Ill., 46."

Do not the facts of this case bring it strictly within this decision? The acts required to be done in order to entitle this defendant to a certificate of the comptroller could only have been done by these incorporators after the act of incorporation had been accepted, the requisite amount of the capital stock subscribed, and the organization under the act completed. Such organization was completed in this case and so declared by the statute; and not until such organization was completed could the certificate of the comptroller have been furnished, as required by the act. And, as we have seen, this association of gentlemen accepted of the act and became incorporated by force of the act, as stated in the beginning of section 5136. The certificate of the comptroller of the currency was required as the evidence of what had been done, and, as was said in the *Maryland case*, the statutes simply prohibited the exercise of the rights and privileges granted to do a bank-

ing business until such certificate was furnished. And it should be said here, as it was said there, that the neglect or omission of these incorporators to observe the requirements of the law in this respect in not completing the payment of their capital and the furnishing of the bonds to the comptroller, would have afforded the United States the right to proceed against the corporation to deprive it of its franchises. But, as it was said in the *Maryland case*, such neglect or omission on the part of these incorporators can never be set up as a defense to an action to enforce its liability, unless it can be shown by some language in this act that the requirements that the capital stock should all be paid in, and that the bonds should be deposited with the comptroller, and that the certificate of the comptroller should issue, which were all requirements of the act of incorporation, were *conditions precedent to the corporate existence of this defendant*. Then this defense cannot be made, because this defense must go *to the corporate existence*, and not to those requirements, which are subsequent to the legal organization of the corporation itself. The statute expressly provides that they are not *conditions precedent to the existence of the corporation*, but the conditions which are precedent to the existence of the corporation are enumerated in the previous sections, namely, the execution and filing of the articles of association, and the execution and filing of the organization certificate. These were executed and filed, as was required by the statute, and as is admitted by the record; upon which being done, the statute provides, "upon duly making and filing articles of "association and an organization certificate, the association "shall become, as from the date of the execution of its "organization certificate, a body corporate." And, as was

stated by Chief Justice Alvey in the *Maryland case*, just cited, by holding otherwise parties might avail themselves of the powers and privileges of a corporation without in any manner subjecting themselves to its duties and obligations, and might set up their own neglect of duty or willful omission to comply with the requirements of the statute as a means of discharge from all their just obligations under the law.

This defendant now is, and its incorporators are doing, or attempting to do, the very thing which was condemned by the court in that case. They have attempted to avail themselves of the powers and privileges of a corporation, by executing this lease and obtaining the possession of our property, and yet they wish to avoid subjecting themselves to the duties and obligations imposed, and how do they do it? They do it by setting up their own neglect of duty, and their own willful omission to comply with the requirements of the statute, namely, they set up that they have not collected the capital stock subscribed, and they set up that they concluded not to proceed with the organization, and they set up that they concluded not to deposit their bonds, and hence, by their own willful neglect of duty, and by their own willful omission to comply with the requirements of the statute, after becoming incorporated, and after having executed this lease, to discharge themselves by this means from their just obligations. *Is it possible that the courts will permit such dishonesty, we might almost say rascality?* They have led us into a course of action greatly to our detriment. They have obtained the possession of our property by holding themselves out as a legally incorporated body, entitled to do a banking business, and then they willfully refuse to perform the requirements of

the statute which, as they claim, was necessary in order to make them liable upon their contracts already entered into.

This is not a question of *ultra vires*, where the corporation, if the contract is fully executed, is estopped to deny its powers; but it is a case where the corporation has a complete legal existence, and where its powers are prescribed by the statute. It is admitted that the plaintiff had no knowledge that this corporation had not taken its final certificate, but by its own acts and conduct it represented to the plaintiff that it was fully organized so to act. It at least was the duty of the corporation to inform the plaintiff of the acts yet required to be done by it, which knowledge was entirely within its own possession. Its officers, represented by their acts and conduct, not only that it had the power to execute this lease, but that it had fully complied with the provisions of the statute which inhibited it from executing such powers. It is estopped now to allege its own misconduct in not having complied with the provisions of the act prior to the execution of such instrument.

This is not like the case of *Thomas* v. *The R. R.*, 101 U. S., 86, where the transfer of the lease was held to be null and void for the reason that no power was conferred upon the corporation to transfer its own franchises. Here power is conferred to do the very thing which was done, but it was improperly exercised, as is claimed, and consequently there can be no claim that the act in question is *ultra vires*, but only the abuse of a well defined power, which matter lay within the discretion of the directors.

Hence, upon the assumption that the execution of this lease was not "incidental and necessarily preliminary to "its organization," but was the exercise of a power in-

cidental to a fully organized bank: or, in other words, was the exercise of a banking power; still, this corporation had the power to do a banking business, and everything incidental thereto. The simple inhibition that it must not, until the happening of a certain event, do a banking business, and things incidental thereto, *did not deprive this corporation of the naked power* to do such a banking business and things incidental thereto, but simply rendered it liable to punishment by a deprivation of its franchise, on application, by the government. Its contract, when made, would not be void as between individuals, although it could be called to account therefor by the government. Hence, for this branch of the argument we may concede that the execution of this lease was the exercise of a banking power, and incidental to a banking business; but we deny that such act is void or *ultra vires*, for the reasons stated.

II.

ESTOPPEL.

THIS DEFENDANT CORPORATION HAVING ASSUMED, BY ENTERING INTO THE CONTRACT WITH THE PLAINTIFF, TO HAVE THE REQUISITE POWER TO DO SO, IT IS ESTOPPED TO DENY THAT IT DID NOT HAVE SUCH POWER, INASMUCH AS IT WOULD HAVE HAD THE POWER UNDER THE STATUTE HAD THE FINAL CERTIFICATE BEEN ISSUED. IN OTHER WORDS, THIS CORPORATION MUST BE TREATED AS A *de facto* CORPORATION, IRRESPECTIVE OF ANY DEFECTS OF ORGANIZATION, AND WILL BE HELD TO HAVE HAD THE POWERS AUTHORIZED BY STATUTE, HAD IT COMPLETED ITS ORGANIZATION.

Whitney v. *Wyman*, 101 U. S., 392, 397.
Chubb v. *Upton*, 95 U. S., 665.
Angell & Ames on Corporation, Sec. 644 and note.
Tarbell v. *Page*, 24 Ill., 46.
Baker v. *Administrator of Backus*, 32 Ill., 79.

In *Whitney* v. *Wyman*, above cited, where it was claimed that there was an imperfect organization at the time of the contract this court said:

"*The corporation having assumed, by entering into the "contract with the plaintiff, to have the requisite power "both parties are estopped to deny it.*"

In *Chubb* v. *Upton*, this court said: "It is settled by "the decisions of the courts of the United States, and "by the decisions of many of the state courts, that one "who contracts with an acting corporation cannot defend "himself against the claim on such contract in a suit by "the corporation by alleging the irregularity of its "organization. This was settled more than a half of a "century since in the courts of the State of New York, "and has recently been affirmed in this court." Nor can the corporation make such defense.

"In *Tarbell* v. *Page*, 24 Ill., 46, suit was brought by "Tarbell against the individual members of the Crystal "Lake Ice Company, avering that he had been employed "by the company as superintendent at a large salary, and "that after a time he was discharged. Suit was brought "for the balance of the salary due him after such dis-"charge. It was pleaded as a defense that the corpora-"tion was never properly organized; the defect com-"plained of being a failure to file a certificate of organ-"ization with the secretary of state." The court said:

"It is alleged that the defendant had failed to comply "with the law by not filing the requisite certificate in the "office of the secretary of state, in compliance with the "statute and that they thereby failed to become incor- "porated and were liable as partners. Whereas it may "be true that a failure to file this certificate in the secre- "tary of state's office may be a non-compliance with the "law as would authorize the people to sustain a suit of "*quo warranto* or *scire facias* and to oust the incorpora- "tors from the exercise of their franchise, it does not "necessarily follow that it is not as to third persons a cor- "poration. This court has held that the regularity of the "organization of a corporation cannot be questioned in a "collateral proceeding. (*Price* v. *R. R.*, 21 Ill., 93.) This "was, *prima facie*, an incorporated company, and was act- "ing as such, and had at least taken some of the steps to be- "come incorporated and had entered upon the exercise of "the franchises pertaining to such body and was treated as "such by plaintiff when he made his contract with them, "and he should not now be heard to say that by reason of "some informality in its organization he will hold them li- "able in any other capacity. He no doubt looked to their "liability as a corporation, with the right of ultimately "looking to the liability of its individual members in the "manner prescribed by the statute, when he entered into "his engagement to render the services, and to avail "himself of the right to recover from the stockholders. "He must pursue the requirements of the statute."

In *Hammond* v. *Strauss*, 53 Md., 1, above referred to, the Supreme Court of that state said: "It has been held "in numerous cases that in actions against the corpora- "tion or a stockholder thereof, as such, it is not incum- "bent upon a plaintiff to prove that the incorporators

"have complied with all the requirements of the act of "corporation, *unless the acts required are conditions* "*precedent to the corporate existence.* And that same "principle precludes the defendant from defeating the "action *by showing the non-compliance of the require-* "*ments of the statute.*"

In other words, that no one dealing with an imperfectly organized corporation is chargeable with notice that it is not fully organized. He is not bound to examine the records of its organization, and no provision is made therefor; but he is entitled to rely upon the statements and conduct of the officers of the corporation as to its legal existence.

No one is required to make inquiry into the organization, where the corporation acts *de facto* as such. This is universal law, and it seems evident to us that we fall under the protection of this principle where this defendant purported to act as a banking corporation and purported to have power to execute the lease, which it would have possessed had it been fully organized. If it were necessary for it, in order to obtain such power, to have its final certificate from the comptroller of the currency, then we had a right to presume that it had such certificate, otherwise it would not have purported to act as such corporation. In other words, it is estopped from alleging the truth after it has led a third party to change his circumstances, relying upon such acts and conduct, to his own detriment. This is the definition of an equitable estoppel, and there can be no more reason why a corporation should not be held responsible for its actions upon the same principle that in case of an individual who *is responsible.* Can this corporation complain of its own wrong-doing, or its failure to do its duty with

reference to its organization? Where a corperation holds itself out to the public as having obtained its charter, then parties dealing with that corporation will be protected to the extent of the chartered powers granted by the legislature. Defects in organization are not in the same category as acts done without right. In this case the Market National Bank held out to the world that it was a legally organized national bank. It had a corporate seal; it had officers; it caused its stationery to be printed, reciting that it was a national bank; the officers thereof wrote letters upon such stationery, signed the same as president and cashier; made contracts in their capacity as president and cashier; ordered the furniture for such bank and the books for such bank, taking possession of the banking office, and did every act whereby a reasonable man could be induced to rely upon its word and the word of its officers, to the effect that it had authority to do the thing it did do, the same as if it had received its final certificate from the comptroller. Hence, the court will hold, for the purpose of this case, that they did have such final certificate, and will prevent them from asserting the contrary, and will not hear anything said which would overthrow such conclusive presumption against them.

It is not sufficient to say that this corporation had some powers, by virtue of the acts already done by the organizers, and hence we are to be referred as to the validity or non-validity of the lease in question to the powers actually and *de jure* possessed by this defective organization. We have a right to believe that this corporation possessed all the powers which the United States statutes confer upon a fully organized corporation. We are referred to the statute itself for our information,

which we are bound to take notice of; we are referred to the charter, which we are bound to take notice of; but we are not bound to know whether the various steps have been taken which are necessary to constitute a fully organized corporation, and which if they had been taken it would have been completely organized and would have had the power to do that which was done. If it had been completely organized there is no question but that the execution of the lease would have been lawful. That it was not completely organized was a question of fact and not a question of law; and as to that question of fact we had the right to rely upon the representations of their duly authorized agent, who ought to have known and did know what the status of affairs was. We are chargeable with notice of the law, namely, of the charter of a bank, but we are not chargeable with notice of the facts necessary to create the corporation, where the corporation as such, and acknowledged by the statute to be a corporation, has represented through its agents that it was a duly organized corporation, competent to do everything and to exercise all the powers conferred by the national banking act. The statute itself does not charge us with notice of the various steps taken from time to time to organize a banking corporation. We are not chargeable with such notice; there is no such provision in the statute itself. If the banking act itself did not confer power upon a bank duly organized to do the thing that was done, we would be chargeable with notice of that defect, because that would be a question of law, with which everyone is chargeable; but we are not chargeable with notice of the fact that there was still some defect in the organization, for as to the representations of its duly constituted agents we had a right to rely upon them and the corporation as a *de*

facto corporation is now estopped from alleging such defective corporation in order to escape its liability.

In *Whitney* v. *Wyman*, 101 U. S., 392, the court did not charge a third party dealing with the corporation with knowledge of the defects and omissions in its organization, but said that the acts of the corporation in making the contract was a representation of its complete organization, by reason of which it was estopped to deny the same.

And to the same effect is *Tarbell* v. *Page*, 24 Ill., 46.

There is no means provided by this statute whereby a person may examine into the various steps of the organization of this corporation, and it has never been held that a person dealing with a corporation, as such, is chargeable with notice of any defect whatever in the various acts of organization. It is nonsense to claim that we were chargeable with notice of the particular steps which had been taken when this lease was taken, and to know that when such particular steps were taken this corporation could do a few things only, and after its complete organization it might do others. If it be true that where a corporation takes certain steps, which of themselves would not complete its corporation, and *which would not confer any actual power upon such corporation*, and that if it acts as a corporation it will be held as a *de facto* corporation, *a fortiori* would it be true that if it takes certain steps which of themselves would confer *some* powers, but not complete powers, upon such corporation it will be held a *de facto* corporation. If a supposed corporation can act so as to bind itself as a *de facto* corporation where it has *no power* whatever to do any act, will not the same acts bind it as a *de facto* corporation where it has *some power* to do some things, but not the thing in question. Why not?

This distinction, in my mind, is absurd, and cannot commend itself. If, as we have said, no one is chargeable with notice of the omission of all the various acts which go to make up a complete corporation, then it is not chargeable with notice of an omission of any portion of such acts, and if it would be liable as a *de facto* corporation under any circumstances, it would be liable under the circumstances of this case.

The law under which this corporation was organized gave power to the directors to make such a lease. It was something the directors might do. If the *law* did not confer such a power, then plaintiff in error knew it and was chargeable with such knowledge of the law, as much as the defendant, but the fact upon which the complete organization depended was necessarily within the knowledge of the defendant, and the plaintiff is not chargeable with a knowledge of the fact, because it was not known to him, and he had the right to rely upon the representation of the defendant as to such fact and it cannot defeat the action by showing a non-compliance of the requirements of the statute, where its officers have previously asserted that they existed.

In *N. Y., etc., R. R. Co.* v. *Schuyler*, 34 N. Y., 73, the Court of Appeals laid down the following doctrine in the celebrated Schuyler frauds:

"Where the principal has clothed the agent with the "power to do an act, upon the existence of some extrinsic "fact necessarily and particularly within the knowledge "of the agent and the existence of which the act of exe- "cuting the power is itself a representation, and third "parties dealing with such agent in entire good faith, pur- "suant to the apparent power, may rely upon the repre- "sentation, and the principal is estopped from denying "its truth to its prejudice."

And Mr. Morawetz, in applying this principle to corporations, in Vol. 2, Sec. 587, says:

"If the persons dealing with an agent, employed to "represent the principal in a definite course of business, "were required to investigate into each particular case "whether he had actual authority to bind his principal, "it would be practically impossible to carry on the busi- "ness by means of the agent, and the primary object of "the agency would be defeated. Hence it may be stated "as a rule, that a party dealing in good faith with an "agent in a transaction which would be within the agent's "authority under ordinary circumstances, might rely up- "on the agent's implied representation that the circum- "stances under which he had authority to bind his prin- "cipal actually exists."

Under this principle Mr. McCormick was entitled to rely upon the representation of the agents of this corporation, that the same had been completely organized; because its complete organization depended upon the existence of extrinsic facts, namely; the payment of fifty per cent. of its capital stock, the delivery of bonds to secure its currency and the issue of a certificate by the comptroller, which facts necessarily and particularly were within the knowledge of the president and board of directors, and the very execution of this lease was itself a representation of the existence of such extrinsic facts; consequently the corporation is estopped from denying the existence of these extrinsic facts to the prejudice of the plaintiff in this case. In other words, this corporation will be treated as a *de facto* corporation, and will be bound in the same way and to the same extent as if the organization had been complete in all particulars.

III.

THE LEASE IN QUESTION WAS INCIDENTAL AND NECESSARILY PRELIMINARY TO THE COMPLETE ORGANIZATION OF THIS BANK.

The last paragraph of section 5136 of the Rev. Stat. of U. S. provides, that, "No association shall transact any "business except such as is *incidental and necessarily pre-* "*liminary to its organization* until it has been authorized "by the comptroller of the currency to commence the "business of banking." Section 5168 provides that "The comptroller shall issue a certificate to do a banking "business after at least fifty per centum of its capital "stock has been paid in and after the necessary govern- "ment bonds shall be deposited to secure the issue of its "currency." Section 5190 provides that "the usual "business of each banking association shall be transacted "at an office or banking house located in the place speci- "fied in its organization certificate."

Was not the execution of this lease incidental and necessarily preliminary to the complete organization of this bank? It will be admitted that this association had the right to elect and appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers; to define their duties and require bonds of them and to fix the penalty thereof and to dismiss such officers or any of them at pleasure and appoint others to fill their places. The statute says, (paragraph 3), that it shall have the power to make contracts. Now, what is the common sense view with reference to what would be a preliminary act to the organization of a bank? It must be presumed that the gentlemen associating themselves intended to

proceed and complete the organization and commence a banking business. There could be no other meaning as to their act; such was their intention. To commence a banking business, therefore, requires a previous organization; not simply of the election of officers, but it requires a place to do its business. It is necessary that there should be some place to keep the money collected of the subscribers to the stock. The payment of such subscriptions was a condition precedent to the issue of the certificate by the comptroller, and no such certificate could be obtained until fifty per cent. of such subscriptions were paid and until the bonds were bought and presented to the comptroller as security for the currency to be issued.

It will be conceded that a bank with a capital of $1,000,000 could not do business upon the street; that it must have a place, not only for the payment of the subscriptions to it, but a place where it could safely keep the money when collected and the bonds when purchased. This necessarily involves the securing of such a place, and was necessarily incidental to its organization. They would require furniture, tables upon which the business was to be done; books of account must be opened, bookkeepers must be employed, the accounts must be kept and hence, it is evident that there could be no complete organization until a place for transacting the business was had. It may be conceded that an office of larger or smaller proportions might be all that would be necessary in the collection of the subscriptions and the safe keeping of same, in the keeping of the books necessary and in the purchase and preservation of the bonds. At the same time that was a matter of discretion with the directors, as to the size of the room, or as to the length of time for which they would take a lease of the

same. It might be, and it was altogether possible at that time that it would require months to collect in the subscriptions so made; it might require law suits to collect the same. It was just prior to the beginning of the panic in 1893, and no one can say that it would have been unreasonable to take the lease of a room, even for such preliminary purpose for six months or even for a year.

If it be conceded that the power existed in the directors to procure a place for the transaction of their business, as preliminary and incidental to the organization, then a mistake or abuse of their discretion in securing a lease for a longer time than was *absolutely* necessary cannot be pleaded as a want of power or as a void contract. The cases are all one way, to the effect that where a power is given for a certain purpose, if such power is abused, or used in excess in attaining such object, and was an improper exercise of judgment or discretion, such excess, or abuse, will not render the contract void.

It is not a question whether the directors used good judgment in the exercise of their discretion in making this lease, but whether they were authorized to exercise their power and discretion at all. If they had the right to exercise their discretion and secure a lease for a banking office for a single day prior to entering upon the business of banking, or for a month or for six months, then they had the discretion to secure a banking office for the period of two years, unless it can be shown that it was a fraudulent performance of their duties, known to the other party. No corporation can escape from the performance of its contract upon the theory that although it had the right to do certain things, yet it made a bad exercise of its judgment in doing it, or used an excess of authority. If the execution of this lease incidental to

the organization of its banking business and preliminary to it, lay entirely without the range of the objects for which the directors were authorized to make a contract, that would be one thing; but when the claim is that there was simply an ill-advised exercise of a right to contract by the charter, and that they did more than they ought to have done, under the circumstances, then there is no invalidity in the contract, and it must be performed, because, under such circumstances, it would be simply an erroneous judgment, or an improper exercise of a discretion clearly conferred, but not any want of power.

This proposition is very plainly laid down in the following cases:

Hayes v. *Covington*, 21 Miss., 408.
Moss v. *Averill*, 10 N. Y., 461.
Littlewort v. *Davis*, 50 Miss., 403.
Ehrman v. *Union Central Ins. Co.*, 35 O. St., 324.
Whitman, Etc., Mining Co. v. *Baker*, 3 Nev., 386.
Farmers' Bank v. *Harrison*, 57 Mo., 503.
Hough v. *Cook Co. Land Co.*, 73 Ill., 23–28.
Alexander v. *Tolleston Club*, 110 Ill., 65.
Barnes v. *Sudden*, 117 Ill., 237.
Davis v. *Old Colony R. R.*, 131 Mass., 258.

In *Haynes* v. *Covington*, 21 Miss., 408, the Supreme Court of Mississippi said: "The distinction is obvious "between a contract by a corporation made in reference

"to a subject lying entirely without the range of the "objects for which its powers are granted and an "irregular or illegal exercise of a right conveyed "by its charter. If a corporation make a con- "tract entirely foreign to the purposes of an institu- "tion, the act is void, simply for want of power, with "reference to the subject-matter, but where a corpora- "tion enters into a contract in reference to a subject "*embraced within the scope of its granted powers, but in do- "ing so exceeds them*, the contract will not thereby be "rendered void. It might constitute a ground for the "resumption of its franchise by the state, but could not "be objected to by the party sought to be charged."

In *Moss* v. *Averell*, 10 N. Y., 449, 460, the court said upon this subject:

"It is conceded that in addition to the powers enumer- "ated in the Revised Statutes, and those expressly granted "by its charter or act of incorporation, no corporation "can possess or exercise any corporate powers, except "such as shall be necessary to the exercise of the powers "so enumerated and given."

In that case the question arose as to whether the corporation had acted in excess of its chartered powers:

The court said:

"Had the corporation subscribed $15,000 for the "erection of a chapel to Union College, or purchased a "farm for an agricultural seminary, or a wholesale store "in the City of New York for the general purposes of "trade, it would not have been denied that those acts "were unauthorized by the charter. In the case so "strongly marked as the one supposed, the judge at the "circuit would have been authorized to nonsuit the "plaintiff. * * * But, where a case is not so strongly

"marked, where the property purchased falls within the "scope of the charter, *and the only objection is that some "articles apparently unnecessary are included*, the good "faith of the purchaser should be submitted as a question "of fact to the jury. * * * They are also, by the "same act, authorized to purchase, hold and use all such "real estate and other property as may *be necessary for "the construction and maintenance of their railroad*, and "the stations and other accommodations necessary to ac- "complish the objects of the corporation. The statute "fixes no other limit to the amount of real estate they "may take in purchase. Suppose that a school house "should stand upon the land embraced in their lines, are "they prohibited from purchasing the land because the "education of youth is not within the powers conferred "by their charter? Could they, for this reason, resist "the recovery upon a note given for the purchase money? "* * * In these and similar cases it would, in my "judgment, be a question for the jury whether the real "estate bought was a *bona fide purchase for the legiti- "mate purposes of the road*, or as an incident of the car- "rying on of a school. In the acquisition of land for a "station or depot, the company are restricted to no lim- "its as to their necessities. Should a railroad corpora- "tion, under pretense of securing land for a depot, pur- "chase a thousand acres of land, and lay it out into city "or village lots, to be sold on speculation, most jurors "would find, under suitable instructions, that the corpo- "ration had transcended its powers. But, suppose the "land purchased was actually enclosed as a depot and "occupied as such, *would the purchase be invalidated be- "cause men might differ as to the precise size of the build- "ing required by the necessities of business?*"

So we might ask in this case. This corporation having the right to do anything incidental and preliminary to a banking business, and having secured a banking office for the period of two years, preliminary to the commencement of the business, would such contract be invalidated because men might differ as to the precise length of time for which the office should be hired, and which might be required by the necessities of the business?

The Supreme Court of Ohio in *Ehrman* v. *Union Central Ins. Co.*, 35 O. Stat., 327, said:

"Where there is an absolute or total want of power in "a corporation to deal in respect to a given subject, it "may be that acts done in the name of a corporation in "regard to such subject, would, as corporate acts, be void "as to all purposes against all persons.

"But there is an obvious distinction between such a "case and one *where the corporation deals with the subject* "*within the scope of its granted powers but with a pur-*"*pose or* IN A MODE *not authorized by its charter.*"

In *Littlewort* v. *Davis*, 50 Miss., 403, the court said:

"If a corporation make a contract altogether outside of "the purpose of its creation, it is void, because it has not "power over the subject in reference to which it acted. "*But if it contracts with reference to a subject within its* "*powers, but in so doing exceeds them*, the person with "whom it deals cannot set up such violation of its fran-"chises to avoid the contract."

In *Whitman Mining Co.* v. *Baker*, 3 Nev., 391, the Supreme Court of that state said:

"It is a well settled rule that corporations created by "legislative enactment, have only such powers as are "specifically granted or are necessarily incident to those "granted, and if they attempt to exercise powers foreign

"to those granted, their acts have been frequently held "void, but there is a difference between exercising pow- "ers entirely foreign to the nature and object of a cor- "poration and *exercising legitimate powers to an improper* "*extent.* A corporation for mining purposes must always "of necessity have some real estate. A deed then to a "mining corporation is not void on its face. If they have "violated the law in taking a greater quantity of land than "is allowable, then they have committed a wrong not "against any particular individual, but against the whole "community, and this wrong can only be inquired into "by a proceeding upon the part of the state. Their "deed to the land, if they buy it from one having title "or other possession, if they only derive title from oc- "cupation, gives them a right to hold against all the "world except the state."

The Supreme Court of Illinois, in *Hough* v. *Cook County Land Co.*, 73 Ill., 23–28, said:

"But appellee being authorized to purchase and hold "lands, and appellant having sufficient capacity to con- "vey, the title was obviously vested in appellee by the "delivery of the deed, and the question whether appellee "has, by its purchase and use of lands, *exceeded the* "*powers conferred by its charter, is one between the state* "*and appellee, by which appellant as a grantor has no* "*concern.*"

In the case of *Alexander* v. *Tolletson Club*, 110 Ill., 65, the owners of land leased to a club all their ground in a certain section. Upon the lessor undertaking to interfere with the club, and upon his repudiating the contract or lease, the club or corporation filed its bill to restrain the lessor from disregarding the covenants of the lease. The Supreme Court in its decision says:

"There is certainly given here the capacity to hold real "estate. What is here in controversy is but a question "of the right of way across intervening land. Even if "appellee has *exceeded in extent* this power of holding "real estate, appellant, we conceive, can not take ad- "vantage of the fact. In *Hayward* v. *Davidson*, 41 "Ind., 214, the rule is acknowledged to be in such cases: "'Where a corporation is authorized by its charter, or "the law of its creation in some cases, to take and hold "a title to real estate as the corporation may for some "purposes acquire, and hold the title to real estate, it can- "not be made a question by any party except the state, "whether the real estate has been acquired for the au- "thorized uses or not.'" * * *

If the Market National Bank has exceeded *in extent* its power in taking a lease for two or five years as preliminary, its contract will not be *ultra vires* or void if it had power *to take a lease for any length of time, even for a single day*, as a preliminary arrangement for the conduct of its business, and it will not rest with the corporation to declare that any part of its contract is void when its officers have simply exceeded the supposed power conferred upon them, and has taken a larger lease than might have been deemed advisable. The decisions of these cases by the Supreme Court of Illinois have been followed in several subsequent cases, and in *Barnes* v. *Suddard*, 117 Ill., 237–242, the Supreme Court said: "The question, "however, is not a new one in this state. In *Hough* v. "*Cook County Land Co.*, 73 Illinois, 23, the authorities "were cited and it was expressly held that where the "corporation had the power to purchase and hold real "estate for a specified purpose, the title to the land will "pass, *although the corporation may have exceeded its*

"*powers*. That whether the corporation has exceeded its "powers in making the purchase, is a question between "the corporation and the state, with which the grantor "has no concern."

"The same question arose in *Alexander* v. *Tolletson* "*Club*, 110 Ill., 65, but it was there held: Where a "corporation, by the law of its creation is authorized in "*some cases or for some purposes, or to a certain extent*, "to take and hold a title to real estate, it cannot be "made a question by any party except the state, whether "the real estate has been acquired for all the authorized "uses or not, *or is in excess of the capacity of the corpo-* "*ration to take and hold.*"

It will be observed that this language is not used and the case is not decided upon the basis of the authority in *Ballard* v. *Bradley*, 55 Ill., 413, that where a contract is fully performed on one side, that the other side is then incapable of repudiating such a contract, though no power existed to make the same. But these decisions are based simply upon the ground that the corporation had power to make a contract with reference to the subject-matter in question, and for some purposes and to a certain extent, and that having such a power, such contract cannot be avoided because the corporation may have exceeded powers which it possessed and made a contract for a longer period of time than is necessary for the purposes of business. Who is to decide whether or not the execution of a lease for a banking office for two or five years was not necessarily preliminary and incidental to the organization of a bank, it being once conceded that a banking office was necessarily for the purpose of conducting their business? In other words, if the corporation had power to make arrangements for a banking office for six months,

or one month, or one day, or a single hour, as preliminary to the conduct of a banking business or to its organization, then that they may have made it for a period of two years, by virtue of such power, is simply the exercise of a discretion, or a mistake of judgment which the corporation itself cannot avoid.

But, as we have heretofore stated, the language of this act itself is of such a character that it fully confers the power to make a lease for any reasonable term preliminary to entering upon the banking business after the issue of the final certificate. It would be a monstrous perversion of justice to say that the plaintiff in this case should lose the opportunity of renting his banking office and shall be deprived of his rents for a long period of time in consequence of the change in the times. If this corporation had not taken this lease, undoubtedly the premises could have been rented at the time to other persons, but the panic of 1893, commencing early in the year, and after this lease was made, necessarily prevented the plaintiff from renting the premises after the surrender on August 15, 1893.

It will not do for the gentlemen to say that they offered to surrender the lease to him and to pay him the rent up to the time of such surrender only, for the reason that he was then unable, in the midst of the panic of 1893 to rent those premises for the balance of the term for any such figure or compensation as he otherwise would have obtained. The plea is used for the purpose of perpetrating a wrong, and it is no answer to say that Mr. McCormick might have taken the lease off their hands without a loss. The facts in this case show that it would have been a very serious loss, because it was finally agreed between them, that Mr. McCormick might rent the premises if he could ob-

tain a tenant without prejudice to the rights of either party, and he was unable to rent the same prior to May 1, 1895. This of itself, shows that the contract being entered into necessarily deprived Mr. McCormick of the privilege of obtaining for his property what he might have obtained for it if this contract had never been entered into at the time it was entered into. If Mr. McCormick were not permitted to sue upon this contract, as a contract incidental and necessarily preliminary to the organization of the bank for conduct of the business, then no contract could be made, under the circumstances, in regard to any subject which could be enforced upon the same reason, because it could just as well be said that a contract for the furniture of the office or the employment of a cashier or teller was not incidental and necessarily preliminary to such organization of a banking business or that any other contract that could be imagined was not necessarily preliminary to such banking business. And, hence all the provisions in that section of the act with relation to contracts made prior to the final certificate, permitting a banking business, would be absolutely without force, because no such contract could be imagined where it could be said that they were necessarily preliminary to the organization of such bank, if the contract in question was not such a one. The statute must have some force or effect. The language of the statute expressly is that it should have power to make such contracts, and it was a contract for every purpose incidental and preliminary to a complete organization and entering upon a banking business proper.

That it was in contemplation of Congress that the securing of a banking office, prior to the commencement of a banking business, was necessarily preliminary to such

business, was manifested by section 5190, where it is provided that "the usual business of each national banking "association shall be transacted at an office or banking "house located in the place specified in its organization "certificate."

This language indicates beyond peradventure that the securing of a banking office was preliminary to a complete organization and to the conducting of a banking business, because the act referred to expressly provides that the banking business shall be transacted at an office or banking house located in the place specified in the organization certificate. *And how could it be conducted at such a house or banking office, if such house or banking office had not been secured prior to the commencement of the business?*

In the case of *Davis* v. *Old Colony R. R. Co.*, 131 Mass., 258, 260, the Supreme Judicial Court of Massachusetts said:

"There is a clear distinction between the exercise by a "corporation of a power not conferred upon it varying "from the objects of its creation and declared in the law "of its organization, of which all persons dealing with it "are bound to take notice, *and the abuse of a general* "*power* or the failure to comply with prescribed formal- "ities or regulations in a particular instance when such "abuse or failure is not known to the other contracting "parties."

In the case at bar there was no exercise by this corporation of a power varying from the objects of its creation. This will be conceded. *The object of its creation* was to carry on a banking business, and to do so it was necessary to have a banking house. The most that can be said of it

is that it was an abuse of the general power granted to the corporation in making a contract for a lease of a banking house for a period of time instead of a temporary lease and until the bank should become regularly organized as a bank to do business. This distinction must be clearly noticed and borne in mind all the time, that the power was conferred which was in consonance with the objects of the creation of the corporation, and this contract did not vary from such objects, and that all that can be claimed is that there was an abuse of the general power, that the directors did not exercise the same with discretion and judgment and, as held in that case, the corporation cannot defend against such an abuse, if it was an abuse.

The same principle was applied in the case of *Zabriskie* v. *The C., C. & C. R. R. Co.*, 23 Howard, 397, 398.

The United States Supreme Court, in *Railway Company* v. *McCartney*, 96 U. S., 267, refers to and approves of the case of the *Union Water Co.* v. *Murphy's Flat Fluming Co.*, 22 Cal., 620, in which decision there are certain fundamental principles laid down in regard to incidental powers, which remarks were as follows:

"The general principle is, however, that a corporation "has no other powers than such as are specifically granted "or such as are necessary for the purpose of carrying "into effect the powers expressly granted. That is, the "general powers of a corporation must be re- "stricted by the nature and object of its institution. "It has been properly held that the general powers inci- "dent to bodies corporate are restricted by the nature and "object of the institution of each, and every such corpo- "ration has power to make all contracts that are necessary "and usual in the course of the business it transacts, as

"means to enable it to effect such object, unless expressly "prohibited by law or the provision of its charter. When "the charter, or act of incorporation and valid statutory "law are silent as to what contracts a corporation may "make, as a general rule it has power to make all such "contracts as are necessary and usual in the course of its "business, as means to enable it to obtain the object for "which it was created, and none other. The dealings of "a corporation which, on their face, or according to their "apparent import, are within its charter, are not to be "regarded as illegal or unauthorized, without some evi-"dence to show that they are of such a character. In "the absence of proof there is no legal presumption that "the law has been violated. On the contrary they, like "natural persons, are entitled to the benefit of the rule "which imputes innocence, rather than wrong to the "conduct of men.

"The mere fact that a corporation organized for the "purpose of constructing ditches for the conveyance and "sale of water, does not of itself make such contract void "as an act exceeding its corporate powers. *Such a con-"tract may be necessary to enable it to attain the object "for which it was created.*"

Now, then, the question arises in this case: Did the power conferred upon this corporation, at the time, to transact incidental and necessarily preliminary contracts to the commencement of a banking business, or a complete organization, include, by a fair construction, the lease in question? Was not this contract necessary, and would it not be a usual contract, under the circumstances, as preparing the way for the conduct of a banking business? As said before, this corporation could not do a banking business in the pocket of its presi-

dent, upon the streets, without an office, and it was absolutely necessary that there should be a preliminary preparation of an office for the conduct of such business when commenced. Just as necessary a preliminary arrangement looking forward to a banking business as it would be necessarily preliminary to employ a cashier or a teller for the purpose of conducting such banking business when commenced. Do the gentlemen contend that this corporation could not have made a contract with its cashier preliminary to the complete organization of the business for a definite and certain time? If it could, then it could make this contract.

This bank could not organize and would not organize, although it had its final comptroller's certificate, without the appointment of a cashier and tellers and bookkeepers, and without a place in which to do its business. The words "*preliminary to its organization*" do not mean a technical paper organization, but they mean a business organization; the securing of all their assistants, bookkeepers, place of business, etc. Organization means a complete outfit, and an actual preparation, by means of which the business of banking might be commenced. It does not mean the organization of a bank upon paper only, but such business arrangements as would enable it to receive deposits, to pay checks and to loan money, and to do this would require a cashier, tellers, bookkeepers, books, office furniture and a place in which deposits might be received and safely kept, and in which checks might be paid and at which loans might be made.

As before stated, it is not the question as to whether it might have made a contract for a shorter time, but granting it the power to make a contract for a business office, or for the employment of a cashier, then it cannot

be contended that because the time such lease had to run, or the time of the employment of such cashier, would be greater than was absolutely necessary, would make such a contract void, because it strictly falls within the power conferred to make such preliminary contracts, and there being no provision as to the length of time which such contracts might have to run, it was simply a matter of good business judgment and discretion whether they were to run one or two years, or for a longer or a shorter time. As was said in the California case:

"Every such corporation has the power to make all "contracts that are necessary and usual, *as means to en-* "*able it to effect such object.* It has power to make all "such contracts as are necessary and usual in the course "of its business, as means to enable it to obtain the ob- "ject for which it was created. *This contract was within* "*the apparent import of its charter, and it is not to be* "*regarded as unusual or unauthorized or unnecessary* "*without some evidence to show that it was of such* "*character.*"

And, as was said in that case, in the absence of proof that such a contract was not necessarily preliminary to the commencement of the business "then there is no "legal presumption that the law has been violated."

And, to further quote the case just cited, "*such a con-* "*tract may be necessary to enable it to obtain the object* "*for which it was created.*" Who can say that the securing of such a banking office might not have been necessary as a preliminary arrangement in order to enable such bank to attain the object for which it was created? If it did not secure a good office in a good location, by such preliminary contract, it might be impossible to secure one when the time should come for the bank to open as such.

There are not many banking offices in the City of Chicago which are considered well located for the purpose, and it would seem to the ordinary business man as the height of nonsense to postpone the securing of such an office until the bank had actually commenced business. The only difficulty about this case is that the bank did not choose to go on with its business. The fault was its own. No one would have pretended that had the bank put up its securities and obtained its final certificate from the comptroller, and had gone on with its business in this banking office for a month, and then had chosen to liquidate and go out of business, that it could have receded from this lease. Yet, it was no less a lease, binding upon the parties in one instance than in the other. It would, indeed, seem strange that a power should be given to a corporation in a condition that this was to make preliminary and incidental contracts for the organization and beginning of the business, and then to hold that *it had no power to make any kind of a contract preliminary to such a beginning*, for it follows that if these contracts could not be made, no contracts could be made, and the whole statute would be inoperative and would mean nothing.

In *New York, etc., R. R. Co.* v. *Schuyler*, 34 N. Y., 73, the court of appeals laid down the following doctrine in the celebrated Schuyler frauds: "Where the princi-"pal has clothed his agent with the power to do and act, "upon the existance of some extrinsic fact necessarily and "particularly within the knowledge of the agent and the "existence of which the act of executing the power is "itself a representation, and third parties dealing with "such agent in entire good faith, pursuant to the ap-"parent power, may rely upon the representation, and "the principal is estopped from denying its truth to his "prejudice."

Mr. Morawetz states the law as follows, Vol. 2, Sec. 587: "If persons, dealing with an agent employed to "represent the principal in a definite course of business, "were required to investigate into each particular case "whether he had actual authority to bind his principal, "it would be practically impossible to carry on the busi- "ness by means of the agent, and the primary object of "the agency would be defeated. Hence, it may be "stated as a rule, that a party dealing in good faith with "an agent in a transaction which would be within *the* "*agent's authority under ordinary circumstances*, might "rely upon the agent's implied representation that the "circumstances under which he had authority to bind his "principal *actually exists.*" * * * "Thus the cashier "of a bank has a general authority to certify checks in "carrying on the business of the bank, and a *bona fide* "purchaser of the check certified as good by the cashier of "the bank upon which it is drawn, is entitled to assume "the existence of every fact upon which the cashier's "authority to certify that particular check depended." (Sec. 597.) Although the drawer of the check did not have any money on deposit, yet if the cashier certifies his check the bank will be bound thereby. The cashier has no actual authority to certify a check when no money is on deposit; yet the act was within the scope of his powers.

In closing we call attention again to the fact that section 5190 provides that "the usual business of each *banking* "*association* shall be transacted at an office or banking "house located in the place specified in its organization "certificate." As we have shown, that under section 5136 this corporation had already been organized *as a banking association*. We repeat that section (5136):

"Upon duly making and filing articles of association "and an organization certificate, the association shall be- "come, as from the date of the execution of *its organi-* "*zation certificate, a body corporate*, and as such and in "the name designated in the organization certificate, it "shall have power, etc."

Now we have heretofore shown that there was certain business which must necessarily be transacted before the paper organization, or issue of the final certificate by the comptroller, namely: The collection of the subscriptions and the purchase and safe keeping of the bonds. This would be part of the usual business of this banking association which is declared a body corporate under the name chosen, and if these things were a part of its usual business, then section 5190 expressly provides that the usual business of each banking association shall be transacted *at an office or banking house* located in the place specified. This section expressly provides that such business is to be conducted in a banking house, and if so the corporation has the right to secure a banking house for that purpose as well as for its general purposes. It cannot be denied, I presume, that the duty of collecting and keeping the subscriptions and the purchase and keeping of the bonds and the purchase of the books and furniture were all necessary and usual business of the corporation so created up to that time; and if so, then it follows that the securing of a banking office at the time this lease was executed was not only incidental, *but was necessarily preliminary* to the final organization created by the issuing of the comptroller's certificate; and, consequently, this lease would be valid and binding under section 5190 of the act.

IV.

Upon their own theory the amount of our judgment is too small by at least $1,100. If this lease was void, then plaintiff is entitled to recover for the executed part, and for all direct damages already incurred prior to the attempted cancelation. The part of the lease executed was the occupation from July 22, 1893, to August 15, 1893, for which no rent was paid, the attempted surrender being upon the latter day. This amounts to $866.66, the rent being at the rate of $1,083.33 per month. The special improvements made by the plaintiff in building a vault and making other changes, as agreed upon for the purpose of accommodating the bank, was $2,475. (Rec., 27, 28.)

The total of the rent, prior to the attempted surrender and the cost of improvements, as per agreement, were $3,341.66; interest at the rate of five per cent. (5%) per annum for three years, $334.16; total amount to which plaintiff is entitled, under defendants' theory, is $3,675.64. We only obtained judgment for $2,548.35; the court below only allowed for one-half of the expenditures made for building the vault and other improvements as agreed upon. We are entitled to the whole. If we laid out our money for the defendants under a void contract, the defendants certainly will be compelled, under the decision of *Thomas* v. *R. R. Co.*, 101 U. S., 71, upon the principle of *quantum valebant*, to pay us for the actual damages suffered, or money paid out for their benefit prior to the time of such attempted surrender. We should receive at least $1,100 more, upon their own theory.

We spent the money—$2,475 (Rec., 26, 29)—at defendants' request and for its benefit, and were to be repaid one-half thereof in case the entire lease was performed; but defendant repudiated the lease; then, upon equitable principles, it must pay us the full amount of such expenditures, the contract so far being executed.

For the various reasons above stated, the judgment should be reversed and the cause remanded.

Respectfully submitted.

A. M. PENCE,
Counsel for Plaintiff in Error.

CHICAGO, October 15, A. D. 1896.

165-538

Supreme Court, U.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1896.

No. 554.

LEANDER J. McCORMICK,
Plaintiff in Error,
vs.
THE MARKET NATIONAL BANK OF CHICAGO,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

ARGUMENT ON JURISDICTION.

A. M. PENCE,
ATTORNEY FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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In Error to the Supreme Court of the State of Illinois.

ARGUMENT ON JURISDICTION.

MAY IT PLEASE THE COURT:

Inasmuch as argument has been ordered touching the jurisdiction of this court, we will proceed to suggest the basis of such jurisdiction.

This suit was brought on June 19, 1895, in the Superior Court of Cook County by the plaintiff in error against the Market National Bank, the claim being upon a lease dated Januar 31, 1893, executed by said bank for a banking office to said plaintiff in error for rent due and accruing subsequent to July 22, 1893, and down to May 1, 1895, at the rate of $13,000 per year, and also for one-half the expenses of fitting up said banking office. All

the facts were stipulated (Pr. Abst., p. 5–25), and it was agreed that under the pleadings the respective parties might establish any cause of action or any defense that they could respectively establish under any form of pleadings. (Pr. Abst., p. 25.) The facts in evidence are sufficiently set out in the opinion by the Supreme Court of Illinois, 162 Illinois, page 100, which is copied into this record. (Pr. Abst., p. 36.)

The Superior Court of Cook County, upon trial without a jury, entered judgment in favor of the plaintiff in error for one-half of the repairs and improvements made according to contract upon said banking office and for the rent due up to August 15, A. D. 1893, at which date the bank attempted to abandon its possession and surrender its lease, and so notified the lessor. The balance for the unexpired term for which the court refused to render judgment, was the sum of $22,208.26 with interest.

The lease was put an end to by plaintiff in error by written notice, in compliance with the terms of the lease, on May 1, 1895.

The bank set up as defense that although the *Articles of Association* had been filed with the comptroller under section 5133 of the national banking act, and although *an Organization Certificate* had been made and filed under section 5134 of the banking act, yet that the Bank had not furnished the bonds to secure its circulation and had not obtained a final certificate from the comptroller under section 5168 of the banking act, and hence was not so fully organized that it was bound by its contract made for the banking office in question, and was not bound to pay rent therefor after the time of abandoning the possession of the same on August 15, 1893, and contended that its contract of lease was null and void as being exe-

cuted without authority of the national banking act. Section 5,136 provides that upon the making and filing the Articles of Association and Organization Certificate the association shall become a *body corporate as* of the date of executing the *organization certificate*. Over half of the capital stock had been paid in and the officers had been elected and the lease was executed under the order of the board of directors. A federal question was fully raised in the court of original jurisdictisn and also in the Appellate and in the Supreme Court of the state. The Revised Statutes of the United States provide, section 709, that "a final judgment or decree "in any suit in the highest court of the state in which a "decision in the suit can be had where * * * any "*title, right*, privilege or immunity is claimed under the "constitution, or any treaty or *statute* of or commission "held or authority exercised under the United States, "*and the decision is against the title, right*, etc., specially "set up or claimed by *either party*, * * * such judg- "ment may be re-examined, reversed or confirmed by "the Supreme Court upon a writ of error."

Plaintiff in error claims a right under this statute of the United States authorizing national banks, namely a right created by the charter of such corporation authorizing it to bind itself as the maker of the lease in question, and the decision of the highest court of the state is against the claim made by us, hence, we bring ourselves within the provisions of the act permitting a writ of error.

In the trial court we raised the questions involved by propositions submitted to be held as law, which the trial court refused, and the court will perceive such propositions or claims involve a Federal question. They are set out on page 25 printed record, and are as follows:

"1st. That the execution of the lease in question by "the defendant was incidental and necessarily preliminary to its organization and to its entering upon a banking business.

"2d. That the execution of the lease in question was "a proper exercise of the powers possessed by such defendant to make contracts under paragraph 3 of section "5136 of the Revised Statutes of the United States.

"3d. That the limitation or last clause of paragraph "7 of said section does not apply to the powers conferred "by paragraphs 1 to 6 in said section; that the Market "National Bank of Chicago had the power to enter into "said lease and to legally bind itself thereby.

* * * * *

"8th. That the plaintiff, under the facts in this case, "as agreed upon, is entitled to recover judgment, at the "rate agred upon in said lease, from July 22, A. D. "1893, up to May 1, A. D. 1895, and also to recover "one-half of the expenses of repairing and changing the "said premises according to the stipulation, with interest "upon each installment as it became due at the rate of "five per cent. per annum."

All the foregoing propositions were refused, and the plaintiff in error excepted to the ruling of the court. The submission of such propositions is permitted by Section 41, Chap. 110, Revised Statutes of Illinois

The Appellate and the Supreme Court of the state may review errors if any committed by the trial court in holding or refusing propositions presented, and reverse or affirm the case for the errors of the court below in holding or refusing such propositions.

First Nat. Bank v. *Haskell*, 124 Ill., 588.
Meyers v. *National Bank*, 128 Ill., 478.

A motion for a new trial, though not necessary, was filed in the trial court raising the same propositions, which was disallowed and refused. (See Pr. Rec., 26.)

The following assignment of errors was made in the Appellate Court. (See Pr. Rec., 28.)

"1st. The Superior Court erred in refusing to find as "a matter of law that the execution of the lease in ques- "tion by the Market National Bank of Chicago, was in- "cidental and necessarily preliminary to its organization "and to its entering upon a banking business.

"2d. The Superior Court erred in that it refused to "find as a matter of law that the execution of the lease in "question was a proper exercise of the powers possessed "by the Market National Bank of Chicago to make con- "tracts under paragraph 3, of section 5136, of the Re- "vised Statutes of the United States.

"3d. The Superior Court erred in that it refused to "hold as a matter of law that the limitation or last clause "of paragraph 7, of said section 5136 of the Revised "Statutes of the United States does not apply to the "powers conferred by paragraphs 1 to 6 in said section, "and that the Market National Bank of Chicago had the "power to enter into said lease and to legally bind itself "thereby.

* * * * *

"8th. The Superior Court erred in that it refused to "find as a matter of law that under the facts in this case "as agreed upon the said McCormick is entitled to re- "cover judgment, at the rate agreed upon in said lease, "from July 22, A. D. 1893, up to May 1, A. D. 1895, "and also to recover one-half of the expenses of repairing "and changing the said premises according to the stipu-

"lation, with interest upon each installment as it became "due, at the rate of five per cent. per annum.

"9th. The Superior Court erred in that it found upon "the issues joined in favor of the said McCormick, and "assessed his damages *only* in the sum of $2,548.35."

"10th. The Superior Court erred in that it did not "find upon the issues joined in favor of said McCormick "and assess his damages the amount of the rent agreed "upon in said lease from July 22, 1893, up to May 1, "1895, together with one-half of the expenses of repair- "ing and changing the said premises according to said "lease, with interest upon each installment as it became "due, at the rate of five per cent. per annum."

* * * * *

"12th. The Superior Court erred in that it entered "judgment upon the findings for said Leander J. McCor- "mick in the sum *only* of $2,548.35.

"13th. The Superior Court erred in that it did not "enter judgment upon the findings for the plaintiff in a "sum equal to the rent agreed upon in said lease from "July 22, 1893, to May 1, 1895, together with one-half "of the expenses of repairing and changing the said "premises, with interest upon each installment as it be- "came due at the rate of five per cent. (5 %) per an- "num."

Other errors were assigned not necessary to mention.

Judgment was entered in the Appellate Court affirming the judgment of the Superior Court and an appeal was taken to the Supreme Court of the state. The opinion of the Appellate Court is published 61 Illinois Appeals, page 63, and was adopted by the Supreme Court of Illinois in 162 Ill., 100. The opinion is found in the printed record here, page 36.

In the Supreme Court of the state (Pr. Rec., 34), the following errors were assigned:

"1st. The Superior Court erred in refusing to find as "law that the execution of the lease in question by the "Market National Bank of Chicago was incidental and "necessarily preliminary to its organization and to its "entering upon a banking business.

"2d. That the Superior Court erred in that it re- "fused to find as a matter of law that the execution of "the lease in question was a proper exercise of the pow- "ers possessed by the Market National Bank of Chicago "to make contracts under paragraph 3 of section 5136 "of the Revised Statutes of the United States.

"3d. The Superior Court erred in that it refused to "hold as a matter of law that the limitation or last clause "of paragraph 7 of said section 5136 of the Revised "Statutes of the United States does not apply to the pow- "ers conferred by paragraphs 1 to 6 in said section, and "that the Market National Bank of Chicago had the "power to enter into said lease and to legally bind itself "thereby.

"4th. The Superior Court erred in that it refused to "find as a matter of law that there was no want of "power on the part of said Market National Bank of "Chicago to execute said lease, but merely a defective "organization, and that said bank cannot plead such de- "fective organization to defeat a recovery.

* * * * *

"8th. The Superior Court erred in that it refused to "find as a matter of law that under the facts in this case "as agreed upon the said McCormick is entitled to re- "cover judgment at the rate agreed upon in said lease "from July 22, A. D. 1893, up to May 1, A. D. 1895,

"and also to recover one-half of the expenses of repair-
"ing and changing the said premises, according to the
"stipulation, with interest upon each installment as it be-
"came due at the rate of five per cent. per annum.

"9th. The Superior Court erred in that it found upon
"upon the issues joined in favor of the said McCormick
"and assessed his damages *only* in the sum of $2.548.35.

* * * * *

"10th. The Superior Court erred in that it did not
"find upon the issues joined in favor of the said McCor-
"mick and assess his damages for the amount of the
"rent agreed upon in said lease, from July 22, 1893, up
"to May 1, 1895, together with one-half of the expenses
"of repairing and changing the said premises according
"to said lease, with interest upon each installment as it
"became due at the rate of five per cent. per annum.

* * * * *

"12th. The Superior Court erred in that it entered
"judgment upon the findings for said Leander J. Mc-
"Cormick in the sum of only $2,548.35.

"13th. The Superior Court erred in that it did not
"enter judgment upon the findings for the plaintiff in a
"sum equal to the rent agreed upon in said lease from
"July 22, 1893, to May 1, 1895, together with one-half
"of the expenses of repairing and changing the said
"premises, with interest upon each installment as it be-
"came due at the rate of five per cent. per annum.

* * * * *

"18th. The Appellate Court erred in that it found
"nothing erroneous, vicious or defective in the record
"and proceedings of the Superior Court.

"19th. The Appellate Court erred in that it found
"nothing erroneous, vicious or defective in the rendition
"of the judgment of the Superior Court.

"20th. The Appellate Court erred that it affirmed "the judgment of the Superior Court."

And other errors were also assigned.

The Supreme Court of Illinois affirmed the judgment of the Appellate Court and filed its opinion, which, under the statutes of Illinois (Rev. Stat., Ill., 1874, Ch. 37, Sec. 16), becomes a part of the record, and will be found in this transcript as before indicated, and also in the 162 Ill., p. 100.

This court has said that where the statute makes the opinion of a court of last resort part of the record, that it may be looked into by this court for the purpose of ascertaining the questions involved and the basis of the decision. *Gross* v. *United States Mortgage Company*, 108 U. S., 477, 486. This court in that case says:

"We cannot, therefore, doubt that in the existing "state of the law it is our duty to examine the opinion "of the Supreme Court of Illinois, in connection with "other portions of the record, for the purpose of ascer- "taining whether this writ of error properly raises any "question determined by the state court adversely to a "right, title or immunity, under the Constitution or laws "of the United States and specially set up and claimed by "the party bringing the writ. Any difficulty existing "upon this subject is removed by that provision of the "Revised Statutes of Illinois which requires, not only "that the justices of the Supreme Court of the state shall "deliver and file written opinions in cases submitted to "it, but that 'such opinions shall also be spread at large "upon the records of the court.' (Rev. Stat., Ill., 1874, "p. 329, Ch. 37, Sec. 16.) This statutory provision "would seem to bring the case within this rule which "permits an examination of the opinions of the Supreme

"Court of Louisiana to ascertain whether the case was "determined upon any ground necessarily involving a "Federal question within the reviewing power of this "state."

Aside, therefore, from the formal presentation of the various points which involve the construction of the nation banking act from the Superior Court up to the Supreme Court, as we have shown, we also show from the decision of the Supreme Court itself that the question involved was a Federal question, and that the judgment rendered by the Supreme Court of Illinois could not be sustained upon the general principles of jurisprudence without at the same time deciding against us as to the validity of our claim under the Federal statute.

The Supreme Court of Illinois held that the bank had no authority under the national banking act to execute the lease in question, and hence it was not bound by it. It also held that the bank was not estopped as a *de facto* corporation to assert the invalidity of its act under the national banking act. Had the decision been the other way and in our favor, and the court had held upon general principles of jurisprudence that the bank was estopped as a *de facto* corporation, then it would be true that the bank could not appeal from such claim, inasmuch as the judgment could be sustained upon general principles without a decision of the Federal question. But here the judgment of the Supreme Court of the State of Illinois cannot be sustained upon general principles without deciding the Federal question adversely to us, and hence the Federal question decided was absolutely necessary to the determination of the case as it was decided by the Supreme Court of the State of Illinois. The bank set up but one defense, viz: the invalidity of the lease under the powers conferred by the national banking act.

It had not suggested itself to counsel on either side of the case that there was any question as to the jurisdiction of this court, but inasmuch as the point has been raised, in order to argue it, we will present some of the authorities in connection with the statement of the case just made.

In *Davis* v. *Packard*, 6 Peters, 41, this court said: "It has always been settled in order to give jurisdiction "to this court under the twenty-fifth section of the judi- "ciary act, it is not necessary that the record should "state in terms that an act of Congress was in point of "fact drawn in question. It is sufficient if it appears "from the record that an act of Congress was applicable "to the case and was misconstrued, and the decision in "the state court was against the privilege of exemption "specially set up under said statute."

The leading case upon jurisdiction constantly referred to by this court is that of *Murdock* v. *City of Memphis*, 20 Wallace, 590. Justice Miller rendered the decision, and stated with great lucidity, as was his custom, the questions decided and what was required in order to enable this court to review the judgment of state courts, and we believe that the principles laid down in that case have never in a single instance since been doubted. On page 635 the court says:

"Finally, we hold the following propositions on this "subject as flowing from the statute as it now stands:

"1. That it is essential to the jurisdiction of this "court over the judgment of a state court, that it shall "appear that one of the questions mentioned in the act "must have been raised and presented to the state court.

"2. That it must have been decided by the state "court, or that its decision was necessary to the judg- "ment or decree, rendered in the case.

"3. That the decision must have been against the "right claimed or asserted by plaintiff in error under the "Constitution, treaties, laws or authority of the United "States.

"4. These things appearing, this court has jurisdic- "tion and must examine the judgment so far as to en- "able it to decide whether this claim of right was cor- "rectly adjudicated by the state court.

"5. If it finds that it was rightly decided the judg- "ment must be affirmed.

"6. If it was erroneously decided against plaintiff in "error, then this court must further inquire, whether there "is any other matter or issue adjudged by the state court, "which is sufficiently broad to maintain the judgment of "that court, notwithstanding the error in deciding the issue "raised by the Federal question. If this is found to be "the case, the judgment must be affirmed without inquir- "ing into the soundness of the decision on such other "matter or issue.

"7. But if it be found that the issue raised by the "question of Federal law is of such controlling character "that its correct decision is necessary to any final judg- "ment in the case, or that there has been no decision by "the state court of any other matter or issue which is suf- "cient to maintain the judgment of that court without re- "gard to the Federal question, then this court will re- "verse the judgment of the state court, and will either "render such judgment here as the state court should "have rendered, or remand the case to that court, as the "circumstances of the case may require."

What were the points decided by the state court in this case? The court, after setting out the provisions of the national banking act, said that it did not regard the making

of the lease as incidental and necessarily preliminary to the organization of the bank or commencing of a banking business, as is provided in the act in question, and hence that the contract in question did not fall within the powers conferred upon a national bank at that stage of its existence, but it did state "for the mere purpose of "doing a banking business it had no power to rent rooms "at all, for the doing of a banking business was not "'necessarily preliminary to its organization.' Its acts "in this regard were not a defective use of power or the "work of a merely *de facto* corporation, but a transac- "tion which this *de jure* and *de facto* corporation was "specially forbidden to engage in. To make this lease "it had no power."

That the Supreme Court of Illinois intended to decide this case upon a question conferring jurisdiction upon this court may be seen by a reference to the opinion of the State Supreme Court. That court said (Pr. Abst., p. 38): "The portions of the United States statutes with refer- "ence to the organization of national banks *which are par- "ticularly material* are as follows:" And the court then sets out sections 5133, 5134, 5135, 5136, 5168 and 5190 of the national banking act.

Again in the same opinion (Pr. Abst., 40), the state court said: "In passing upon this case we are first called upon "to determine the effect of the United States statute, "reading: 'But no association shall transact any busi- "ness except such as is incidental and necessarily prelim- "inary to its organization until it has been authorized "by the comptroller of the currency to commence the "business of banking.'"

No one can allege that this is not a construction of the Federal statute which denies our claim that this corpora-

tion in its then present state had the power to make the lease in question.

The Supreme Court of Illinois further stated: "As "before stated, the attempt to make this lease was more "than an abuse of power or an improper exercise of "judgment. It was an attempt to do that for which no "power existed. The proceeding was neither within the "express nor implied scope of its powers. On the con- "trary, power to do this thing was directly denied."

It also says: "The case at bar is not like that of "*Turbell* v. *Page*, 24 Illinois, 46, or *Bushnell* v. *The* "*Consolidated Ice Co.*, 138 Illinois, 67, in which *de facto* "corporations made contracts within the powers of the "*de jure* body each held itself out to be; neither is this "case similar to that of *Chubb* v. *Upton*, 96 U. S., 95, "in which one who had subscribed for stock attempted to "defend upon the ground that the stock for which he "subscribed was part of an increase of capital which the "company had without authority attempted to make. "*We are herein called upon to deal, not with irregu-* "*larities, but with a plain attempt to do what was abso-* "*lutely forbidden, and we are asked to enforce an execu-* "*tory contract made in defiance of the law the same as if* "*it had been fully organized.*"

Is there any doubt then that the Supreme Court of Illinois denied our claim that the national banking act conferred the power upon this corporation to make this contract which it did make?

The disposition of this Federal question and the determination of it adversely to our claim and contention was necessary before the second question could arise, namely, whether or not this bank could be estopped by

its conduct as a *de facto* corporation. That question could only arise after the disposition adversely to us of the Federal question, namely, that it had no power under the national banking act to make this lease, and hence the decision of the Federal question was an absolute necessity and necessarily involved the determination of the whole case. The Supreme Court of Illinois held that it was not a *de facto* corporation, and hence was not estopped upon principles of general jurisprudence, but that is of no consequence if it was a *de jure* corporation, as we contend, and possessed the power under the Federal statute to do the thing it did do.

The Supreme Court of Illinois further states in the case: "Nor is the company, because it represented "itself as fully authorized to make this lease, now es- "topped from insisting upon its want of power. On the "contrary, it is its duty to cease to act in defiance of the "law, and it has no right by silence to suffer itself to be "driven into a continuance of what was always wrong. "To enforce the part of this agreement which yet re- "mains executory would be for the court to declare that "a corporation can by a contemptuous disregard of law "acquire powers forbidden to it." (Pr. Rec., p. 41.)

While commenting upon the opinion we shall refer to the fact that the court found that we were entitled to recover rent for the time the bank actually occupied our banking office and for the one-half of the improvements made by us under a supplemental agreement, and for this the court gave us judgment to the extent of $2,548.35, and refused to allow us anything for the rent of the premises after the abandonment by the bank on August 15, 1893, and up to May 1, 1895, when the lease was finally terminated by limitation or notice.

The court said in that connection: "It is well settled "that while corporations cannot be rendered directly "liable upon *ultra vires* transactions, they must account "for the benefits received therefrom. Where benefits "have been received under an *ultra vires* agreement, re- "lief granted is not upon the basis that a valid or merely "voidable contract has been entered into, but the act not "being *malum in se*, the parties will, as near as they well "can be, be restored to their original condition.

"We have discussed the questions submitted upon the "lines presented by appellant, who, the contract having "been partially executed, recovered a judgment for $2,- "548.35. It is not here contended nor does it appear "that this was not equal to the entire benefit received by "appellee." (Pr. Abst., p. p. 41, 42.)

It may be possible that this court was misled by the fourth point in our brief upon the merits, page 59, in which we took the position that aside from what we were entitled to for non-performance of the lease after August 25, 1893, that we should have been allowed more than was allowed to us up to that date upon the theory of the bank's counsel, which was that the contract being absolutely void that we were entitled to recover for all damages up to the time they abandoned its performance, and hence we contended that we were entitled to not only one-half of the repairs put upon the bank by us for their use, as was agreed upon between us (Pr. Rec., 16), but upon their theory we would be entitled to the entire expense of making such repairs. That point, however, has nothing to do with the main proposition which we urge here, that we were entitled to recover for the damages we suffered by reason of the non-performance of the entire contract after August 15, 1893. We admit

very freely there is no Federal question involved in point IV of our brief, but that is entirely apart from the question of jurisdiction; and the point was inadvertently made by us, and is one upon which we are entitled to no decision by this court.

The other claim made by us under the national banking act to recover for the unexpired portion of the lease, does involve a Federal question.

In *Waite* v. *Dowley*, 94 U. S., 527, 532, Justice MILLER said: "This is a writ of error to the Supreme "Court of the State of Vermont, and, as is frequent in "writs to the state courts, it is objected that there is no "jurisdiction. The plaintiff in error was cashier of a "national bank in that state; and the judgment which "this writ brings here for review was rendered against "him for penalties imposed by a statute of that state, for "his refusal to transmit to the clerk of the Town of "Brattleboro, a true list of of the shareholders of the "bank who resided in that town, with the number of "shares held, and the amount paid on said shares. The "record shows that 'the defendant's counsel claimed in "defense, that, as said bank was organized under the law "of Congress referred to in plaintiff's declaration, the "defendant, as such cashier, was amenable to no law but "said law of Congress, and that the state legislature had "not power to prescribe or define his duties as such "cashier.' That this proposition raises what is called a "Federal question, within the meaning of the act of 1867, "admits of no doubt. *We are also of opinion that no judg-* "*ment could have been rendered against the defendant in* "*the state courts, without holding, and in effect deciding,* "*that this plea was bad;* for, if the state could not im- "pose the duty of making such a list on the cashier by

"reason of the act of Congress or the Constitution of "the United States, then the defendant was guilty of no "offense, and the judgment is for that reason erroneous. "This plain proposition cannot be evaded by any opinion "delivered by the Supreme Court of that state. This "court, therefore, has jurisdiction."

It will be observed in that case that the defendant claimed a right, privilege or immunity under the Federal statute. Here we claim such a right. If there be no Federal statute in our case granting us the right, of course the decision of the state court would be correct upon that question. But if the banking act confers upon us a right to hold the bank upon its contract, and it being decided against us, or if we make claim under such banking act, whether rightfully or wrongfully, this court has jurisdiction. We have a right to have this court pass upon the question. Every contract of every corporation must always be referred to its charter, and its charter is conferred by superior power. In this case all the powers which this bank possessed are obtainable under and by virtue of the national banking act, and if we claim that such power existed to make this lease by virtue of its charter, then we claim by virtue of a Federal statute, and the claim having been decided adversly we come within the jurisdiction of this court. In the case last referred to, the cashier referred to the charter of his bank under which he was acting as an officer, which was the same Federal statute as here invoked, and the court held that it had the jurisdiction to review his rights under that Federal statute, the same having been decided adversly to him.

In *National Bank* v. *Matthews*, 98 U. S., 621, A executed a promissory note to B, and to secure the payment

thereof, a deed of trust of lands, which was in effect a mortage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B, who thereupon assigned them to the bank. The note not having been paid at its maturity, the trustee was, pursuant to the power, proceeding to sell the lands, when A filed his bill to enjoin the sale upon the ground that by sections 5136 and 5137 of the Revised Statutes (national banking act), the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. It was held by this court that the bank was entitled to enforce the collection of the note by a sale of the lands.

It is important to call the attention of this court to the fact that the question of jurisdiction was never raised or decided by the court in the *Matthews* case, but the court as a matter of course took jurisdiction. It was a writ of error to the Supreme Court of Missouri, and that court held that inasmuch as a national bank was prohibited from loaning money upon real estate security, that, therefore, the contract was void, thus necessarily involving the construction of the Federal statute, and the national bank properly brought the case to this court, and this court proceeded to review the construction put by the state court on the national banking act in reference to the powers conferred upon the bank to make such a contract. That is what we ask for here. We ask this court to construe the national banking act in reference to the powers of this corporation, *which is declared to be a corporation by the act itself*, although the final certificate is not issued. The Supreme Court of Missouri decided adversely to the claim of the bank, which claim was that it had the power to accept of security and make said contract. We say the same here, and

ask the court to construe the national banking act to the effect that this corporation had the power to make this contract with us. The only difference between the two cases, so far as we can discern, is, that in that case the Supreme Court of the state decided adversely to the bank, and hence the bank had a right to a writ of error. In the case at bar the Supreme Court of the state decided in favor of the bank, and hence the other side has the right to appeal in case, inasmuch as his right depends upon the proper construction of this act, which we have shown it does.

In *National Bank* v. *Whitney*, 103 U. S., 99, a writ of error was sued out to the Supreme Court of the State of New York. That case was similar to the case just cited of *National Bank* v. *Matthews*. The point there was that the national bank had no right to take real estate security for loan of money, and hence that said contract was void. This court, referring to *National Bank* v. *Matthews*, decided that it was not void, and it entertained jurisdiction to review the case without any one ever raising the question that it did not have jurisdiction.

In the case of *Swope* v. *Leffingwell*, 105 U. S., 3, the question of jurisdiction was raised upon a similar case to the two just cited. That was a writ of error to the Supreme Court of Missouri, where an attempt was made to enjoin the sale of real estate under a trust deed executed to secure a promissory note to a national bank. The Supreme Court of Missouri construed the National Bank law in that case as authorizing the act, and the other side appealed. Motion was made to dismiss the writ of error for want of jurisdiction, upon the ground there was no Federal question involved. Up to that time no one had

ever raised the question. The chief justice delivering the opinion, said:

"*We have jurisdiction of this case. The motion to* "*dismiss is, therefore denied;* but as the only Federal "question presented on the merits was decided by the "court below in accordance with our rulings in *National* "*Bank* v. *Matthews* (98 U. S., 621) and *National Bank* "v. *Whitney* (103 U. S., 99), the motion to affirm is "granted."

We cannot perceive the distinction between the question there and here, unless the other side can show that the Supreme Court of the State of Illinois decided the case upon some general principles of jurisprudence which in no manner involve the construction of the Federal statute, but, as we have shown in this case, there could have been no decision of this question the way it was decided without first holding that the national banking act conferred no power to make the contract in question.

The case of *Logan County National Bank* v. *Townsend*, 139 U. S., 67, seems to us a clear exposition of our rights as claimed by us under the national banking act, and if that case involved a Federal question, so does this. In that case the plaintiff sold to the bank certain bonds at 68½ cents on the dollar, and the bank made an agreement with the plaintiff that it would, on plaintiff's demand, replace the bonds to him at the same price or less. The plaintiff, relying upon said promise and agreement of the bank, made the sale to the bank, and upon demand by the plaintiff, the bank refused to comply with its promise and agreement to replace the bonds. At the time of the commencement of the action and of plaintiff's demand, the bonds were worth 100 cents on the dollar, and by reason of the refusal of the bank to comply

with its promise to replace the bonds the plaintiff claimed to have sustained damage to the amount of $4,032, the difference between the price paid by the bank for the bonds and their par value. *The bank set up as defense that it had no power or authority to make the contract to replace the bonds* and hence that the contract was void and not binding upon it. Verdict was rendered for the plaintiff, and also a special finding that the contract was made as alleged. The court instructed the jury that if the defendant agreed and promised on demand to return the bonds, and refused to do so, that they must find for the plaintiff the difference between the price paid and the value of the bonds at the time the demand was made. The court refused to give an instruction asked by the defendant to the effect that being a national banking association, it had no power or authority to make the contract in question. Other instructions were given and refused, but none of them distinctively involved the question of the liability of the defendant bank to the plaintiff under its charter and the act of Congress relating to national banking institutions. Judgment having gone against the bank, it sued out a writ of error from this court to the Court of Appeals of Kentucky, alleging that a Federal question was involved.

This court, in the course of its opinion upon the question of jurisdiction, said: "The Court of Appeals of "Kentucky thus disposed of that question: 'The last "ground is that the contract is *ultra vires* the corporate "authority of the bank in direct violation of its charter, "and, consequently, is not such an obligation as will "charge the bank or make it to any extent, either in law "or conscience, liable in damages or otherwise for breach "of the conditions. It seems to us that if the proposi-

"tion be conceded it would not avail appellant, for if it "had no authority under its charter to purchase the bonds "it cannot, in justice and conscience, refuse to abide by "the judgment in this case, which involves nothing more "than the return of the bonds and receipt of what it paid "for them. To do less cannot be justified without per- "mitting it to profit by its own wrong in violating the "law of Congress under which it exists. Probably, ac- "cording to a fair construction of the national bank act, "the power is not expressly given to appellant to pur- "chase and deal in bonds of the character in question; "but neither is it expressly prohibited by the act to do "so, and there is a proper and well recognized difference "between 'the case of an engagement made by a cor- "poration to do an act expressly prohibited by its char- "ter or some other law, and a case where legislative "power to do the act has not been granted.' See *Hitchcock* "v. *Galveston*, 96 U. S. 341, and numerous authorities "there cited. In that case the following from the *State* "*Board of Agriculture* v. *The Citizens' Street Railway* "*Co.*, 47 Ind., 407, was quoted with approval: 'Al- "though there may be a defect of power in a corpora- "tion to make a contract, yet if a contract made by it is "not in violation of its charter or of any statute pro- "hibiting it, and the corporation has by its promise in- "duced a party relying on the promise, and in execution "of the contract to expend money and perform his part "thereof, the corporation is liable on the contract.' If "the special findings of the jury in this case be taken as "true, there needs no argument to show that the rule "thus laid down applies to the contract we are consider- "ing, and to adopt the opposite of that rule would in- "vite a disregard of the provisions of the national bank

"act, as well as fraud and bad faith towards those deal-
"ing with a corporation existing under it."

After citing the above quotations from the Court of Appeals of Kentucky, this court proceeded: "Upon the "question raised by the defendant in error as to the juris-"diction of this court, it is sufficient to say that the fifth "paragraph of the answer, that the bank had no power or "authority to make the contract to which a demurrer was "sustained, and one of the defendants requests for the in-"structions, which was refused, proceeded alike upon the "ground that the bank was forbidden by the National "banking act to make the contract or agreement set out "in the petition, and, consequently, that it was exempted "from liability to the plaintiff upon any ground what-"ever. The exemption or immunity thus specially set "up in the court of originial jurisdiction, and re-asserted "in the Court of Appeals of Kentucky, having been de-"nied by the judgment, the authority of this court to re-"examine that judgment, so far as it determine that no "such exemption or immunity as that claimed by the "bank, under the act of Congress, exists, is entirely "clear. That the Court of Appeals of Kentucky may "have held the bank liable independently of the question "whether the act of Congress forbade or did not forbid a "national bank from making such a contract as the "petition recites, *does not show a want of jurisdiction "in this court*; for the defendant's contention was, and "is, that consistently with the act of Congress it cannot "be held liable to the plaintiff upon any ground. So that "the judgment necessarily determined, adversely to the "bank, that it had no such exemption or immunity as it "asserts in virtue of the national banking act. It is not "a case—if the bank be right in its contention—in which

"the judgment can rest upon some ground of general law,
"adverted to by the state court, and sufficiently broad
"to support it without reference to the act of Congress
"as interpreted by the bank. We must, therefore, inquire
"whether the act of Congress protects the bank from lia-
"bility to the plaintiff in any aspect in which his claim
"may be regarded."

In that case the national bank attempted to avoid a contract made by it for want of power and authority conferred by the national banking act. In this case this bank sets up precisely the same defense to the contract, namely, want of authority conferred by the national banking act. In that case the highest court of the state decided there was such power and authority. In this case the Supreme Court of Illinois, the highest court of the state, held their was not such power or authority under the national banking act, otherwise the cases are precisely the same. In that case the bank appealed because the highest court of the state denied its claim under the Federal statute. In this case the plaintiff appealed because the highest court of the state denied its claim under the same Federal statute. In that case this court said that the Court of Appeals of Kentucky may have held the bank liable independently of the question whether the act of Congress forbade or did not forbid a national bank from making such a contract as the petition recites, does not show a want of jurisdiction in this court.

In the case at bar the defendant's contention was that consistent with the act of Congress it cannot be held liable to the plaintiff upon any ground, so that the judgment of the Supreme Court in this case necessarily determined adversely to the plaintiff in error that the bank had such exemption or immunity

as it asserts in virtue of the national banking act. The case at bar is not a case if the bank be not right in its contention, in which the judgment of the Supreme Court can rest upon some ground of general law sufficiently broad to support it without reference to the act of Congress as interpreted by the bank. *If plaintiff's construction of the national banking act be the correct construction then there is no general principle of law upon which the judgment of the state court could be sustained.*

It seems to us that the foregoing case, therefore, is conclusive as to the question of jurisdiction in this case.

In *Metropolitan National Bank* v. *Claggett*, 141 U. S., 520, this court held that when a state bank acting under a statute of the state, calls in its circulation issued under state laws and becomes a national bank under the laws of the United States, and a judgment was recovered in a court of the state against the national bank upon such outstanding circulation, the defense of the state statute of limitations having been set up, a Federal question arises which may give this court jurisdiction in error.

The conversion of a state bank in New York into a national bank, under the act of the legislature of that state, did not destroy its identity or its corporate existence, nor discharge it as a national bank from its liability to holders of its outstanding circulation, issued in accordance with state laws.

The provisions in the statute of New York as to the redemption of circulating notes issued by a state bank and the release of the bank if the notes should not be presented within six years after closing business, do not apply to a state bank converted into a national bank and *not closing the business of banking.*

The statute of the State of New York provided that a limitation would run within six years after the closing of the business of banking under the state law if the notes were not presented, and this court held that the business of banking was not closed by changing from a state to a national bank, and hence that the statute of limitations did not apply.

This court in the course of its decision said: "The "court found that the plaintiff in error did become a "national bank doing a banking business under the laws "of the United States, but decided that it did not thereby "acquire an immunity from liability to pay the bank "bills of the Metropolitan Bank of New York, upon the "ground that the proceedings set up in the answer did "not terminate the existence of the state bank, but "simply effected a continuation of the same body under "a changed jurisdiction. In this we think the record "presents a claim of Federal immunity raised by the "plaintiff in error and denied by the court, which brings "the case within the jurisdiction of this court."

In the case of the *Chemical National Bank* v. *Hartford Deposit Company*, 161 U. S., 1, the national bank in question became insolvent and had a receiver appointed, and subsequently abandoned the possession of the banking office for which it had made a lease for a term of years. The bank was sued for rent, just as in the case at bar. Judgment was entered in the court of original jurisdiction in favor of the bank; that judgment was reversed by the Appellate Court and judgment entered therein for the full amount of the rent for the entire unexpired term after abandonment, which judgment of the Appellate Court reversing the Superior Court was affirmed by the Supreme Court of the state, and the bank was held liable for the

full amount of the rent for the unexpired term. A writ of error was sued out by the bank to this court. The defense was set up that after the appointment of a receiver of the National Banking Association it was no longer liable upon the unexpired term of its lease, and thus sought to avoid the contract.

The Chemical Bank set up a claim of immunity under the national banking act, which was decided adversely by the state court. This court entertained jurisdiction and said there was a Federal question involved and decided the Federal question against the bank, and the judgment of the court below was affirmed. The foregoing is a case in which the principles involved are in all respects like the case at bar, the only difference being that the bank sued out a writ of error in that case claiming a right under the national banking act which had been decided adversely to it. In the case at bar, the lessor, the plaintiff in error, sued out the writ, claiming a similar right under a Federal statute which is decided adversely to him. There is no more reason in this case than in the case just referred to why this court should not entertain jurisdiction.

In the judgment of the undersigned this court clearly has jurisdiction.

If the court will permit, we desire to call attention to the cases of *National Bank* v. *Whitney*, 103 U. S., 99, and *Thompson* v. *St. Nicholas Natl. Bank*, 146 U. S., 251, in connection with our argument upon the merits under point I of such argument, and not there cited by us.

The first case raised a contention that a national bank could not loan money upon a real estate security, and that the same is prohibited by the statutes.

And the court, following the Matthews case, said: "Viewed in the second aspect, as a loan upon real estate "security, the court observed (in the Mathews case) that "so treating it, the consequence insisted upon did not "follow; that the statute did not declare such securities "void, but was silent upon the subject; that had Con- "gress so intended, it would have been easy to say so, "and it can hardly be presumed that this would not have "been done instead of leaving the question to be settled "by the uncertain result of litigation and judicial de- "cision.

"And, after citing numerous cases where a disregard "of statutory prohibitions has not been held to vitiate "the contracts of parties, but only to authorize actions "by the government against them, the court held (in the "Mathews case) that the prohibitory clause of the bank- "ing law did not vitiate real estate securities taken for "loans, and that a disregard of them only laid the asso- "ciation open to proceedings by the government. 'The "impending danger' said the court, 'of a judgment "of ouster and dissolution was, we think, the check, "and none other contemplated by Congress. That "has been always the punishment prescribed for the wan- "ton violation of a charter, and it may be made to follow "whenever the proper public authority shall see fit to "enforce its application. * * * The decision in the "case cited controls the present case, and in conformity "with it we must hold that the mortgage to the bank, so "far as the subsequent incumbrances are concerned, is "to be regarded as a valid security for the future ad- "vances to the mortgagor. Whatever objection there "may be to it as security for such advances, from the "prohibitory provisions of the statute, the objection can "only be urged by the government."

And, in *Thompson* v. *St. Nicholas Natl. Bank*, above cited, 146 U. S., 251, this court approves of the language of the Whitney case, and said "that a disregard by "a national bank of the provisions of the act of Congress "forbidding it to take a mortgage to secure an indebted- "ness then existing, as well as future advances, could "not be taken advantage of by the debtor, but 'only laid "the institution open to proceedings by the government "for exercising powers not conferred by law.'"

Respectfully submitted.

A. M. PENCE,
Atty for Plaintiff in Error.

CHICAGO, December 21, 1896.

Supreme Court, U. S.
DEC 26 1896
J. H. McKENNEY,
CLERK.

165-534

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 534.

LEANDER J. McCORMICK,
Plaintiff in Error,
vs
THE MARKET NATIONAL BANK OF CHICAGO,
Defendant in Error.

Error to the Supreme Court of Illinois.

BRIEF FOR DEFENDANT IN ERROR ON QUESTION OF JURISDICTION.

HIRAM T. GILBERT,
ATTORNEY FOR DEFENDANT IN ERROR.

BARNARD & MILLER, PRINTERS.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

No. 554.

LEANDER J. McCORMICK, *Plaintiff in Error,* *vs.* THE MARKET NATIONAL BANK OF CHICAGO, *Defendant in Error.*	Error to Supreme Court of Illinois.

Brief for Defendant in Error on question of Jurisdiction.

MAY IT PLEASE THE COURT:

Section 709 of the Revised Statutes of the United States provides, that "a final judgment or decree in any "suit in the highest court of a state, in which a decision "in the suit could be had * * * where any title, "right, privilege or immunity is claimed under the Con- "stitution, or any treaty or statute of, or commission "held or authority exercised under, the United States, "and the decision is against the title, right, privilege or "immunity specially set up or claimed, by either party,

" under such Constitution, treaty, statute, commission or " authority, may be re-examined and reversed or affirmed " in the Supreme Court upon a writ of error."

It is by virtue of the above provision that the jurisdiction of this court, if it exists at all, can be maintained. But if the language of the statute be strictly construed it is evident it does not confer upon this court jurisdiction in the case at bar. It is to be observed that the statute does not give this court jurisdiction in every case that may involve the construction of a statute of the United States, or the determination of the powers of an individual or corporation under such statute. On the contrary, the jurisdiction of this court is confined to cases where any title, right, privilege or immunity is claimed under such statute, and the decision of the State Court is adverse to such claim of title, right, privilege or immunity.

The plaintiff in error did not in the court below claim any such title, right, privilege or immunity. The claim of immunity from liability was one set up by the defendant in error and the decision of the State Court was in favor of and not adverse to the immunity thus claimed.

Counsel for plaintiff in error has cited several cases in support of his contention that this court has jurisdiction, but in each of them the decision reviewed by this court was one in which the claim of title, right, privilege or immunity had been specially set up by the party prosecuting the writ of error and decided adversely to such party by the State Court. We are aware of no case, and none has been cited by counsel for plaintiff in error, where this court has entertained jurisdiction of a writ of error in a case where the title, right, privilege or immun-

ity claimed in the State Court was allowed by the court. We therefore assume that the language of the statute must be construed to mean precisely what it says, and to not confer upon this court jurisdiction in a case like the one at bar.

For this reason we submit that the writ of error should be dismissed for want of jurisdiction.

HIRAM T. GILBERT,
For Defendant in Error.

165-538

Office Supreme Court, U. S.
FILED
DEC 3 1896
JAMES H. McKENNEY,
CLERK.

165-538

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

554

LEANDER J. McCORMICK,
Plaintiff in Error,

vs.

THE MARKET NATIONAL BANK OF CHICAGO,
Defendant in Error.

Error to Supreme Court of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR.

H. T. GILBERT,
For Defendant in Error.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

LEANDER J. McCORMICK,
Plaintiff in Error,

vs.

THE MARKET NATIONAL BANK OF CHICAGO,
Defendant in Error.

Error to Supreme Court of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR.

H. T. GILBERT,
For Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

The question presented in this case is whether a national banking association which has entered into articles of association and made an organization certificate and filed the same in the office of the comptroller of the currency, but which has not been authorized by the comptroller to commence the business of banking, has power through its board of directors to enter into a contract of lease of a banking-room and place of business for a period of two years or more for the purpose of carrying on the business of banking, and, if not, whether, when such lease has been entered into and possession of the premises has been taken by the association, such association, by surrendering, or offering to surrender, the leased premises to the lessee, can relieve itself from liability under such lease for rent accruing subsequent to the day of such surrender, or offer to surrender, or, in other words, whether such lease must be treated as an executed contract, and, therefore, binding for the entire term, or as one only partially executed, and, therefore, not binding after the date of the surrender or offer to surrender.

The facts out of which this question arises are substantially as follows:

In January, 1893, A. F. Seeberger and others entered into articles of association and made an organization certificate for the purpose of organizing a national banking

association, with a capital stock of $1,000,000, to be known as the Market National Bank of Chicago, which articles and certificate were duly filed in the office of the comptroller of the currency as provided by law. On the 9th of February, 1893, Seeberger, who was president of the banking association, acting in pursuance of a resolution of the board of directors, entered into a lease in the name of the association with McCormick for the premises in question, to be used as its banking-room and place of business. The term of the lease was from May 1, 1893, to May 1, 1898, and the rental was at the rate of $13,000 per annum, payable in monthly instalments of $1,083.33, with a provision that either party might cancel the lease on May 1, 1895, after giving ninety days' previous notice. There was also an agreement that McCormick should make certain improvements in the banking-room, and that one-half the expense thereof should be borne by the bank. The premises were not ready for occupacy on the date fixed by the lease for the taking of possession by the bank, but the improvements agreed upon were made by McCormick, and the premises were finally put in condition so that on June 22, 1893, the officers of the bank took possession, and paid McCormick rent at the stipulated rate down to July 22, 1893. The cost of the improvements was $2,475, which was paid by McCormick.

The bank was never authorized by the comptroller to commence the business of banking, and never did commence it, but on July 15, 1893, the capital stock not having been paid in to an amount sufficient to enable the bank to secure the necessary authority to commence the business of banking, the articles of association and organization certificate were revoked, and on the same day

new articles of association were entered into and a new organization certificate made for an association to be called The Market National Bank of Chicago, with a capital stock of $500,000, which were filed in the office of the comptroller of the currency. The persons entering into the articles of association and making the organization certificate last mentioned were in part the same as and in part different from those who had entered into the former articles and made the former certificate.

On August 15, 1893, the officers of the bank informed McCormick that the bank had never been authorized by the comptroller of the currency to commence the business of banking, and had no power to enter into the lease, and offered to surrender the demised premises and the lease. Prior to this time McCormick had supposed that the bank was duly and legally organized as a national bank and that it was ready to do a banking business and had the power to enter into the lease, but it does not appear that this supposition on his part was induced by any representations made by the officers of the bank, or that the officers of the bank, in entering into the lease, did not act in good faith.

The offer made by the officers of the bank to surrender the leased premises and the lease was declined by McCormick. Subsequently, on September 20, 1893, the officers of the bank made another attempt to surrender the demised premises to McCormick by leaving with his duly authorized agent the keys to the banking office, but the agent refused at that time to accept the keys or to accept the surrender of the lease.

In October, 1893, the bank and McCormick entered into an agreement, the terms of which were that McCormick should take possession of the leased premises

and do his best to rent them without prejudice to either party to the lease. In accordance with this agreement McCormick did take possession, but was unable to rent the premises, although he made every effort to do so.

Upon the foregoing facts the trial court held that the Market National Bank had no power to enter into the lease at the time it was entered into, and that it was only liable for rent of the premises down to the date when it made the offer to McCormick to surrender them to him, and accordingly found in favor of the plaintiff for that amount of rent, together with one-half, which the bank had agreed to pay, of the expenses of improving the premises, which expenses were $2,475, the total amount found by the court being $2,548.35, and for that amount judgment was rendered in McCormick's favor.

That judgment was afterwards affirmed by the Appellate Court of the First District and the judgment of the Appellate Court was affirmed by the Supreme Court of Illinois. To reverse the judgment of the latter court the present writ of error is prosecuted.

BRIEF.

I.

The lease was one which the defendant had no power to enter into.

R. S. of United States, Secs. 5,133, 5,135, 5,136.

II.

The case is not one of the abuse of an existing power.

III.

The case is not one of a contract with a corporation defectively organized.

IV.

The prohibition contained in the statute invalidates all transactions entered into in violation thereof.

V.

The lease in question, not being a contract fully executed by either party and being *ultra vires*, cannot be enforced by the lessor as to so much of the term as had not expired at the time the officers of the bank offered to surrender.

Thomas v. *Railroad Co.*, 101 U. S., 71.
Penn. R. R. Co. v. *St. L. etc. R. R. Co.*, 118 U. S., 290.
Oregon Ry. & Nav. Co. v. *Oregonian Ry. Co.*, 130 U. S., 1.

Morawitz on Corporations, Secs. 580, 581.

Angell & Ames on Corporations, Secs. 288, 301.

Alexander v. *Caldwell*, 83 N. Y., 480, 485.

Davis v. *Old Colony R. R. Co.*, 131 Mass., 258, 260.

VI.

The claim of plaintiff that the judgment is too small cannot be sustained. It does not involve a federal question.

Chem. Nat. Bk. v. *City Bk. of Portage*, 160 U. S., 646.

ARGUMENT.

I.

THE LEASE WAS ONE WHICH THE DEFENDANT HAD NO POWER TO ENTER INTO.

Sections 5,133, 5,134 and 5,135 of the Revised Statutes of the United States provide that a national banking association may be formed by the making and filing with the comptroller of the currency of articles of association and an organization certificate in the form thereby prescribed. Section 5,136 is as follows:

"SEC. 5,136. Upon duly making and filing articles of association and an organization certificate the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

"*First.* To adopt and use a corporate seal.

"*Second.* To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

"*Third.* To make contracts.

"*Fourth.* To sue and be sued, complain and defend, in any court of law and (or) equity, as fully as natural persons.

"*Fifth.* To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

"*Sixth.* To prescribe, by its board of directors, by-

laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title.

"But no association shall transact *any* business except such as is *incidental and necessarily preliminary to its organization* until it has been authorized by the comptroller of the currency to commence the business of banking."

As it appears from the agreed statement of facts that the Market National Bank of Chicago was never authorized by the comptroller of the currency to commence the business of banking, it would seem that the question whether it had power to enter into the lease in question depended, first, upon whether to enter into a lease of a banking room is to transact business within the meaning of the act, and, second, whether the making of such a lease is incidental and necessarily preliminary to a bank's organization.

1. That to enter into a lease of a banking room for a term of years is to "transact business" would seem to be very clear. The making of any contract is a business transaction within the ordinary and usual meaning of that term, and hence giving the words of the statute their ordinary and usual signification, as the rules of construction require us to do, it necessarily follows that the prohibition of the statute is against the making by the bank of such a

lease or any other contract, until it has been duly authorized to commence the business of banking.

It will be observed that the statute does not say, "no "association shall transact any *banking* business," etc., and therefore it must be assumed that the prohibition was not directed against the transaction of banking business alone, but against the transaction of business of any and every kind. Had the congress intended that the bank might transact all kinds of business excepting that of banking, it would have limited its prohibition accordingly.

2. That the making of a lease of a banking room for a term of years, by a banking association, is not "incidental and necessarily preliminary to its organiza- "tion" is likewise clear. The transactions which are incidental and necessarily preliminary to the organization of a national banking association are the entering into the articles of association provided for by Section 5133 of the Revised Statutes of the United States, the making of the organization certificate provided for in section 5135, and the collection of at least fifty per centum of the capital stock provided for in section 5140, as essential to the obtaining by the association of authority to commence the business of banking.

It could scarcely be contended, and certainly not with any reason, that the renting of a banking room for the term of two or more years, at an expense of ten or fifteen thousand dollars a year, was necessarily preliminary to the entering into of the articles of association, the making of the organization certificate and the collection of fifty per centum of the capital stock. All these steps in the organization of a national banking association can certainly be taken without the renting of a banking room

such as the one specified in the lease under consideration.

The argument for appellant that the lease was one which the bank had the power to make, is based upon the assumption that the prohibition in question must be construed as if it prohibited the transaction of any business " except such as is incidental and necessarily prelim- " inary to its *commencement of the business of banking.*" Were such the construction to be given to the act we would have little doubt that the lease was one which the bank had the power to make. A bank cannot commence a banking business very well without a banking room in which to transact it and the leasing of a banking room would very properly be held to be a transaction incidental and necessarily preliminary to the commencement of a banking business. But the objection to such a construction of the statute is the obvious one, that it is not warranted by the language the congress has seen fit to use. If it had been the intention of the framers of the law to prohibit the transaction of only such business as was not necessary or incidental to the commencement of the business of banking, no reason is perceived why the prohibition should not have been put in those express terms. Not having used that language, but on the contrary having used lan guage of a very different meaning, we are not at liberty to say that the congress did not mean what it has plainly and distinctly said. The organization of an association is a very different thing from its commencement of business.

Again, if the congress had intended this prohibition to apply only to the business of banking it is not easy to understand why it was placed in a paragraph by itself, in-

stead of being incorporated in division seventh of Section 5,136. Had the congress added to division seventh the words, " but no association shall transact any bank- " ing business until it has been authorized by the comp- " troller of the currency to commence the business of " banking, " it would have plainly had the meaning which counsel for appellant now wish to have given to the law as it stands.

This question is difficult to argue because of its simplicity. The plainer a proposition is the more difficult it is to present arguments in its support. In a case like this, where the question is one of the construction of the language of a statute, about all that can be said, no matter how much language is used to say it, is that the statute means precisely what it says. Giving this statute that meaning, which by all the rules of construction it must be given, it prohibits every kind of business transaction whether it does or does not pertain to the banking business, unless it be one incidental and necessarily preliminary to the organization of the association.

While it is unnecessary to furnish any reason for the enforcement of a statute in accordance with its manifest meaning, it being the duty of the court to enforce it regardless of the reasons for which it was adopted, it may nevertheless, be added that the strict enforcement of the prohibition in question is necessary to the protection of the stockholders of the association as it furnishes them with the assurance that the money paid in by them upon assessments shall remain intact until the association is authorized to commence the business of banking, and, in case, before such authority is obtained, the organization of the association is abandoned, the money paid in by them upon their stock will be returned. It is to be pre-

sumed that stockholders subscribe for their shares in reliance upon the statute which protects them against the dissipation of their capital in transactions forbidden by law. If the officers of a bank could incur a liability upon a lease extending during a long term, they could by the same reasoning incur a liability in contracting for the purchase of real estate, or in respect to any other transaction, that might possibly be within their powers, if fully organized as a banking association, and thus the money of shareholders subscribed for the purpose of commencing the business of banking and for no other purpose might be wholly dissipated. In suggesting this, however, we do not wish to be understood as contending that the prohibition in question would relieve the association from liability with respect to all contracts entered into in violation thereof. As will be seen hereafter, notwithstanding the prohibition, the association would be liable upon contracts that had been executed though not upon those that were executory.

For these reasons we respectfully insist that the lease in question was one which the bank had no power to enter into.

II.

THE CASE IS NOT ONE OF THE ABUSE OF AN EXISTING POWER.

It is insisted by counsel for plaintiff in error that when power is given to a corporation for a certain purpose, if such power is abused or used in excess, or, in other words, improperly exercised a contract resulting therefrom will not thereby be rendered void, and that the case at bar falls within this rule. In this, however, it seems to us, counsel for appellant are mistaken.

If we were prepared to concede that the bank, at the time the lease in question was signed, had the power to lease a banking room at all, we would not insist that it would be a defense to a suit upon the lease that the banking room thus secured was larger than its business warranted or the law contemplated. In other words, if there was a provision in the statute by which the power of the bank, with respect to leasing a banking room, was only limited to the leasing of such a banking room as was necessary for its business, it could not successfully defend a suit brought upon a lease on the ground that the banking room leased was larger than necessary. The power possessed by the bank under such a statute would call for the exercise of discretion on the part of its officers, and such discretion, when exercised by the governing body, would undoubtedly bind the bank in favor of a party contracting with it, and having no knowledge that the discretion thus conferred had been abused.

In the case at bar, however, there was no abuse of discretionary power, but, on the contrary, the attempted exercise of a power which the statute forbid. The lease

(Rec , 17) recites that the offices are leased "to be used "and occupied by said Market National Bank *as a bank-* "*ing office, and for no other purpose*," and consequently there could be no pretense the lease was made in the exercise of the power of the association to rent a room for the mere preliminary work of organization. That the renting of a banking room for a term of years was not a transaction incidental and necessarily preliminary to the bank's organization was so clear that every person dealing with it was bound to take notice that it was a power it did not possess at all, and not a mere abuse of a power which did, in fact, exist.

For these reasons we deem it unnecessary to comment upon the authorities cited under this head by counsel for appellant.

III.

THE CASE IS NOT ONE OF A CONTRACT WITH A CORPORATION DEFECTIVELY ORGANIZED.

The law is well settled that in the case of a corporation *de facto* neither party to a contract can take advantage of the circumstance that there may have been some defect in the organization of the corporation. A corporation which makes a contract is thereby estopped from denying its own legal existence, and, on the other hand, one who contracts with a corporation will not be permitted to deny the legal existence of the other party to the contract.

But that is not the case at bar. The statute, as we have seen, declares that "upon duly making and filing "articles of association and an organization certificate "the association shall become, as and from the date of "its organization certificate, a body corporate," etc. At the date of the lease in question the defendant had made and filed its articles of association and organization certificate, and it was therefore a corporation *de jure*. Hence the case at bar is not one of a lawful contract entered into with a corporation *de facto*, but is one of an illegal contract entered into with a corporation *de jure*.

IV.

THE PROHIBITION CONTAINED IN THE STATUTE INVALIDATES ALL TRANSACTIONS ENTERED INTO IN VIOLATION THEREOF.

It is contended by counsel for plaintiff in error that it was not the intention of the congress in adopting the limitation at the end of section 5,136, to render the contracts provided for in said section, or any of them, null and void, but simply to give power to the government to punish the corporation or forfeit its charter for a disregard of this provision. The authorities cited by counsel for plaintiff in error will be found, upon examination, to be essentially different from the case at bar.

In *National Bank* v. *Matthews*, 98 U. S., 621, where money was loaned by the bank and real estate security taken therefor in contravention of section 5,137 of the Revised Statutes, it was held that the borrower could not be allowed, in a suit brought to foreclose, to rely as a defense upon the fact that the security was taken in violation of law. The difference between that case and this is very plain. There the contract had been fully executed by the corporation, and the defendant had obtained its money by means thereof. The case was, therefore, one for the application of the well settled rule that it is no defense to a contract that has been fully executed, that it was one entered into in violation of law, it not being immoral nor *malum in se*.

In *Harrod* v. *Hamer*, 32 Wis., 162, cited by counsel for plaintiff in error, the suit was brought against the stockholders of a corporation as partners, on the ground that the corporation had never been legally organized,

because there had not been a compliance with a statutory provision which required that, before any corporation commenced business, the president and directors should cause the articles of association to be published. The court decided that, by the terms of the statute, the corporation was duly organized, though its articles of association were not published, and therefore its stockholders were not liable as partners. No such question was involved as that which is here presented.

In *Hammond* v. *Strauss*, 53 Md., 1, also cited by counsel for plaintiff in error, the suit was brought against a stockholder of a banking corporation by a depositor, to secure the amount of his deposit. The ground of the suit was, that the corporation had commenced business before it had complied with all the requirements of the statute. The language of the court that "such neglect or omission can never be set up, either by the corporation itself, or its stockholders, as a defense to an action to enforce their liabilities," when considered in the light of the fact that the contract there in question was one that had been fully executed by the plaintiff, has no force when attempted to be applied to the case at bar.

In *Whitney* v. *Weyman*, 101 U. S., 392, a corporation organized pursuant to the provisions of a statute, but before its articles of association were filed with the county clerk, entered into a contract for the purchase of certain machinery to enable it to carry on its business. After it had filed its articles it recognized the validity of the contract, and the contract was fully executed by the other party. The court held the corporation was bound by the contract.

As to the statements of the law laid down by Mr. Morawetz in his work on corporations and quoted by

counsel for plaintiff in error, it is sufficient to say that they are based upon cases of fully executed contracts and have no application to continuing executory contracts such as the one now under consideration. The same is true of the other authorities cited by him.

It is undoubtedly true that a prohibition contained in a statute doesn't always render the prohibited act void. The law on this subject is accurately stated in 27 Am. & Eng. Ency., 378–381, as follows:

"The effect to be given contracts in violation of ex-
" press statutory provision depends upon the intention of
" the legislature, to be found by the application of the
" ordinary rules of statutory construction. It may be
" stated as a general rule, that if a statute expressly pro-
" hibits a corporation from making a certain contract,
" such contract is void, and that it is void may be pleaded
" in a suit brought exclusively upon the contract. * *
" * But to the general rule above stated, there are
" several well recognized exceptions: *First.* Where the
" inhibition is intended for the benefit and protection of
" a particular class of persons interested in the corpora-
" tion, as, for instance, the shareholders, the depositors
" (of a bank or savings institution), the creditors, the
" subscribers (of a building society), the policy holders
" (of an insurance company), such effect will be given the
" contract as will best promote the interests of the
" favored class. * * * *Second.* When the statute
" contains a specification of the consequences which
" shall follow a violation of its provisions, and they are
" other than that the contract shall be void, the contract
" is valid and inforcible."

The rules thus stated are fully supported by the cases cited in their support.

Prima facie, then, the prohibition contained in the statute now under consideration must be regarded as rendering the lease in question void, and it must be so held unless the case falls within the exceptions stated. As to the second exception, it is sufficient to say that the statute prescribes no penalty for its violation, and as to the first, it is equally clear that the interests of shareholders or depositors do not require that the transaction should be upheld. In this respect the case differs from *National Bank* v. *Matthews*, 98 U. S. 621, and similar cases. To hold as void a loan made upon real estate security or in excess of the limit prescribed by law, and thus subject the bank to the loss of the money loaned, or to hold void any other executed contract by reason of which the bank had parted with its money, would subject the shareholders and perhaps also the depositors of the bank to loss, and thus prohibitions framed for their express benefit would be made the means of their injury.

In the case at bar, however, to hold this lease void will not injure either shareholders or depositors, but on the contrary it will be the means of protecting the shareholders against loss by reason of an illegal act of the bank's officers, which illegal act was participated in by the plaintiff, while on the other hand the plaintiff, by being awarded a judgment for the rental value of the premises for the time they were occupied by the defendant, will be as fully protected against loss as the circumstances of the case will permit.

V.

THE LEASE IN QUESTION, NOT BEING A CONTRACT FULLY EXECUTED BY EITHER PARTY, AND BEING ULTRA VIRES, CANNOT BE ENFORCED BY THE LESSOR AS TO SO MUCH OF THE TERM AS HAD NOT EXPIRED AT THE TIME THE OFFICERS OF THE BANK OFFERED TO SURRENDER.

The law is well settled that where a continuing contract, which is *ultra vires*, has been partly performed on one side, it is treated as executory in respect to its future and further performance and will not support an action for failure to go on with it. A lease is a continuing contract in this sense and, if *ultra vires*, the lessee may throw up an unexpired term without liability for damages.

In *Thomas* v. *Railroad Company*, 101 U. S., 71, a railroad company had leased all its road, rolling stock and franchises for a period of twenty years. At the end of five years it resumed possession, and an action was brought against it, under the lease, for the value of the unexpired term. The lease having been held to be *ultra vires*, it was claimed that the lessee was entitled nevertheless to have it enforced as an executed contract. But Mr. Justice MILLER, in delivering the opinion of the court, said:

"It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

"In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish* v. *Wheeler* (22 N. Y., 494), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

"But what is sought in the case before us, is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action, damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

"Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

"We cannot see that the present case comes within the principle that requires that contracts which though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction."

In *Penn. R. R. Co.* v. *St. Louis, &c., R. R. Co.*, 118

ance. As already stated, the contract was one by which the plaintiff demised its road, privileges and franchises for the period of ninety-six years from the 1st of August, 1891, to the defendant, who took possession of it, and used and occupied it, under the lease, until the fifteenth day of May, 1884, a period of less than three years. It did then what was equivalent to returning the property to the plaintiff, and refused to be further bound by the contract.

"To say that a contract which runs for ninety-six years, and which requires of both parties to it continual and actual operation and performance under it, becomes an executed contract by such performance for less than three years of the term, is carrying the doctrine much farther than it has ever been carried, and is decidedly a misnomer. This class of cases is not governed by the doctrine of part performance in a suit in equity for specific performance, nor is this a suit for specific performance. This is an action at law to recover money under a contract which is void, where for nearly three years the parties acted under it, but in which one of them refuses longer to be bound by its provisions; and the argument now set up is that because the defendant has paid for all the actual use it made of the road while engaged in the actual performance of the contract between the dates just given, it is thereby bound for more than ninety-three years longer by the contract which was made without lawful authority by its president and board of directors. We consider this proposition as needing no further consideration except a reference to the discussion of the same subject in *Thomas* v. *Jersey R. Company* and *Penn. R. R. Co.* v. *St. Louis, A. & T. H. R. R. Co.*, already cited."

The cases cited would seem to be conclusive against a recovery by the plaintiff in this case, unless the plaintiff can show some substantial difference between the lease now under consideration and those involved in the cases referred to. But counsel for plaintiff in error in their argument in the court below said:

"The plaintiff had fully performed his contract so far

" as it was in his power to perform. The title had " passed from him into the defendant during that period, " and the plaintiff had lost entire control over the prop- " erty. He had delivered to the defendant all that he " had for the period of time contracted for, and nothing " else remained for him to do. He had fully performed " the consideration on his part. The defendant had re- " ceived the benefit of the contract."

What was thus said, if it were applicable to the lease now under consideration, would be equally applicable to the leases referred to in the cases cited. In each of them it could with equal force be said that the lessor had fully performed its contract, so far as it was in its power to perform; that the title had passed from it to the lessee during that period, and that the lessor had lost entire control over the property; that it had delivered to the lessee all that it had for the period of time contracted for, and nothing else remained for it to do; that it had fully performed the consideration on its part, and that the lessee had received the benefit of the contract. It is, however, manifestly incorrect to say that a lessor has fully performed his contract the moment he executes the lease, for, as a matter of fact as well as a matter of law, such a contract can never be said to be fully executed until the expiration of the term therein provided for. The lessor does not perform his full duty by merely signing the lease and delivering possession of the demised premises, for it is his duty and a part of the contract that the lessee shall be allowed to quietly enjoy and not be evicted from the premises during the term.

But it was also said in the court below that the defendant never actually surrendered the premises in question to the plaintiff, but retained possession during the whole

period up to May 1, 1895, and that its furniture and books still remained in the office, and the possession thereof was never actually surrendered, but was retained by the defendant, and the plaintiff never entered upon the actual possession until the date mentioned, and that, therefore, the contract was fully executed. This claim made by counsel for plaintiff in error is, however, clearly untenable.

By the agreed statement of facts (Rec., 31) it appears that on August 11, 1893, the plaintiff was duly notified of the abandonment of all further proceedings with respect to the carrying on by the defendant of a banking business, and that the defendant would not occupy the premises mentioned in the lease, and that the plaintiff was at liberty at any time to take possession of the same, and that on the same day (Rec., 28) the officers of the defendant informed plaintiff that defendant had no power to enter into the lease; that defendant had never been authorized by the comptroller of the currency to commence the business of banking, and offered to surrender both the demised premises and the lease, but that the plaintiff then and there refused to accept such surrender. It also appears (Rec., 29) that on September 20, 1893, another attempt was made on behalf of defendant to surrender the premises and the lease, and to that end the key of the banking room was tendered to plaintiff's duly authorized agent who refused to accept the same, or to accept the surrender of the lease and that thereupon the key was thrown upon his desk, and left there. It also appears (Rec., 29) that on October 4, 1893, an agreement was entered into between plaintiff and defendant, in pursuance of which McCormick actually did take possession of the premises, such possession being taken, however, without prejudice to the rights of either party.

These facts effectually estop the plaintiff from insisting that the defendant continued in possession of the demised premises until the end of the term, and that therefore the lease must be viewed as a contract fully executed on the part of the plaintiff. It is difficult to imagine what other steps the officers of defendant could have taken to accomplish a surrender of possession of demised premises. It is true they might have utterly abandoned the premises, and thus exposed them to greater injury of being damaged; but they certainly could not compel the plaintiff to take the possession that was offered him. Having been notified that the lease was *ultra vires*, and that the defendant had no power to perform its terms, and the officers of defendant having done everything in their power to induce the plaintiff to take possession, the plaintiff is manifestly estopped from insisting, as a ground of liability, upon possession which the defendant made every effort to get rid of, but could not.

But it is suggested that the evidence shows that the plaintiff was not able to find another tenant for the premises during the term provided for by the lease; that, consequently, if he cannot recover in this suit he will suffer serious loss, amounting to loss of rent during the entire term, and that for this reason the defendant ought to be held liable. It is undoubtedly unfortunate for plaintiff that he entered into this lease, and it is to be regretted that he should suffer any pecuniary loss on that account, but we cannot see that the circumstances suggested require the application of any different rule from that laid down in the cases above referred to. To terminate any executory contract is almost certain to result in some loss to the parties. But the fact that such loss may occur is no ground for placing such a contract upon the footing

of one fully executed. To do so would be to abolish all distinction between the two kinds of contracts and to give effect to and enforce every kind of an *ultra vires* contract, regardless of whether it was executory or executed.

Nor is there anything in the suggestion that the defendant held out to the world that it was a legally organized national bank and performed acts from which plaintiff might reasonably infer that it had authority to enter into the lease in question.

A person dealing with a corporation must at his peril take notice of the terms of its charter, and of the fact that acts in excess of the charter are necessarily in excess of the authority of the agent performing them. The rule does not rest upon the ground that a charter or general incorporation law is a public statute of which all persons are deemed to have notice. It is a rule based upon no technical doctrine, but upon the necessities of the case. It applies to foreign corporations as well as to domestic corporations, and to corporations chartered by private acts of the legislature as well as those whose charters are part of the general laws.

Morawetz on Corporations, Secs. 580, 591.
Angell & Ames on Corporations, 288, 301.
Alexander v. *Cauldwell*, 83 N. Y., 380, 485.
Davis v. *Old Colony R. R. Co.*, 131 Mass., 258, 260.

At the time the lease was entered into, therefore, plaintiff was bound to take notice of the fact that defendant had not been authorized by the comptroller of the currency to commence the business of banking, and

had no power to enter into the lease in question. The fact that he may have been ignorant of this want of power, and that he may have supposed that the association had power to enter into the lease, is immaterial. No representations were made to him upon the subject, and as he was bound to take notice of the terms of the act of congress, and could by inquiry have ascertained whether the association had been authorized to commence the business of banking, he cannot be heard to insist, as a ground of enforcing a contract, that he was in fact ignorant of matters of which the law charged him with notice.

VI.

THE CLAIM OF PLAINTIFF THAT THE JUDGMENT IS TOO SMALL CANNOT BE SUSTAINED.

Counsel for plaintiff in error contends that upon the defendant's own theory the amount of the judgment in this case is too small by at least $1,100, and insists that the trial court, in addition to the rent from July 22, 1893, to August 15, 1893, should have allowed the plaintiff the entire cost of changing the offices and building the vault, etc., in the demised premises which was $2,475, instead of one half of that amount which the court did allow. To this contention there are two answers:

In the first place the agreement between plaintiff and defendant (Rec., 28) was that defendant should pay one-half of the cost of changing the offices and building the vault, etc., and the trial court, therefore, could not well find plaintiff was entitled to recover more on this account than he had expressly agreed he would accept.

In the second place, the only federal question involved

in this case and upon which this court has power to pass is the question, whether the lease under consideration was one which the act of congress prohibited defendant entering into. If the Supreme Court of Illinois decided that question correctly this court can pursue no other course than to affirm its judgment; for the question as to how much damages plaintiff was entitled to upon the surrender by defendant of the leased premises, under the circumstances detailed in the agreed statement of facts, is one dependant, not upon any act of congress, but upon general principles of law, as to which this court cannot review the judgment of the Supreme Court of Illinois.

Chemical Nat. Bank v. *City Bk. of Portage*, 160 U. S., 646.

The judgment of the Supreme Court of Illinois should, therefore, be affirmed.

H. T. GILBERT,
For Defendant in Error.